

15. D. d.

REPORTS
OF
CASES

Determined in the
High Court of Chancery,

FROM

April 25. 1740. to May 9. 1741.

WITH

Two TABLES; One of the NAMES of the
CASES, the other of the PRINCIPAL MATTERS.

BY

THOMAS BARNARDISTON,
Serjeant at Law.

In the SAVOY:

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M DCCXLII.

LETTER

To the Right Honourable

Philip Lord Hardwicke,

Baron Hardwicke

Lord High Chancellor of Great Britain

of the High Court of Chancery



Write
following
letter

I have the pleasure to inform you that the
manuscript of the

My Lord, it is a great pleasure to me
to hear that you can give me that
Character, to which I am so
has done. But I am sure it will
it becomes a great pleasure to me
Opportunity to me to which I
elation of it

To

TO the RIGHT HONOURABLE

Philip Lord Hardwicke,

Baron of *Hardwicke,*

Lord High Chancellor of
GREAT BRITAIN.

MY LORD,

I Was extremely unwilling to write a Dedication to the following Sheets; but I thought the Greatness of your Lordship's Character demanded it of me.

MY LORD, it is very rare, that any Person can arrive at that Dignity of Character, to which your Lordship has done. But when that is attain'd to, it becomes every Man, that has an Opportunity, to make a Publick Declaration of it.

To

The Dedication.

To the Labours and Abilities of your Lordship this Nation is greatly indebted. It highly Profits, not only by your Lordship's Determinations in Courts of Justice, but by your Assistance in his Majesty's Councils. We, my LORD, that are of the Bar, must chiefly admire your Lordship in the former Point of Light. In that we see Justice administred with that Dignity and Impartiality, which is becoming it. Every one, that attends your Lordship's Court, is conscious of this. And that your Lordship may for many Years continue to do so, is the hearty Desire of,

MY LORD,

Your Lordship's

Most dutiful, and

Obedient Servant,

Tho. Barnardiston.

A

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A Table of the Names of the Cases.

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D E

Termino Paschæ

1740.

In CURIA CANCELLARIÆ.

*Brook and Gally.**April 25.*

Robert Hobart, an Infant about Eighteen Years of Age, was placed by his Grandfather, who was his Guardian, at an Academy of Mr. Montiniack's in *Mary-le-bon*. Whilst he was there he was allowed by his Guardian seven Shillings a Week for Pocket Expences; but not being very well pleased at the Manner of dressing of Victuals at Mr. Montiniack's, it being dressed after the *French* Fashion, he had a Mind to get some Provisions somewhere else. Accordingly now and then he used to go to the Defendant *Galley's*, who kept a Coffee-house, and between the 1st of *April* 1735 and the 20th of *September* following run up a pretty considerable Score there. At the Time the Score was running up *Gally* knew that *Hobart* was an Infant about Twenty Years of Age, and knew too that he was under the Care of Mr. Montiniack. After this Score was run up *Montiniack* went to *Gally's*, and inquired of him how much *Hobart* owed him? *Gally* refused to give him an Account of it, and told him, That it was not his Business to in-

B

quire.

quire. Another Acquaintance of *Hobart's* went to *Gally's*, and ask'd him much the same Sort of Question. *Galley* refused for Half an Hour together giving him any Account of it at all; but at last said it was about forty Shillings.

The Grandfather of *Hobart* died, and thereupon, a short Time after, about *September*, *Hobart* went to *Mr. Brooke's* at *Normich*, who was his Uncle. Whilst he was there, and about two Months before he came of Age, *Gally* sent *Hobart* down a Bill of Particulars that he owed him. In this Bill there was an *Item* of *Claret, Champaign* and *Burgundy*, drunk on the 4th of *June 1735*, amounting to 6*l.* 18*s.* 7*d.* There was another *Item* of 12*s.* for *Barbadoes Waters*, and a Third for 15*s.* for keeping of his Dog. The rest of the *Items* consisted chiefly of Meat and Drink that either *Hobart* alone had, or that he and his Friends had at *Gally's* House; the whole Bill amounted to 59*l.* 8*s.* *Hobart* came of Age on the 23d or 24th of *March* following, and on that Occasion made an Entertainment at an Inn at *Normich*. *Gally* took Care to be down at that Time, and asked *Hobart* for the Money. On the 26th of the same Month *Hobart* gave him a Note for it, whereby he promised to pay the 59*l.* 8*s.* upon Demand. A few Years after *Hobart* died, and made *Brooke* his Executor. *Gally* brought his Action on this Note against *Brooke*, and thereupon *Brooke* filed the present Bill against *Gally*, praying that this Note might be delivered up, and that an Injunction might be granted to stay the Proceedings in that Action.

Mr. Noel argued on the Part of the Defendant, and for Authority cited *Abr. of Ca. in Eq.* 282. *Marlow* and *Pitfield*, determined at the *Rolls* in the Time of *Lord Macclesfield*, and the Case of *Burton* and *Edwards*, reported in 4 *Leon.*

Lord Chancellor said, That there were two general Questions for his Consideration; one arising on the Transaction between *Hobart* and *Gally* before the Time that *Hobart* came of Age; the other arising on the Note that *Hobart*,

bart gave after he came of Age. With Regard to the first of these Questions his Lordship observed, That the Circumstances attending that Transaction were certainly such as ought to be discountenanced by the Court. Here is a young Lad, an Infant, who by the Law is under Disabilities to make any Contract other than for Necessaries.

The Reason that such Persons are under this Restraint, and that Contracts made by them shall not be binding, is not always on Account of Impositions being actually made upon them, but for the publick Consideration of the Case, that they are liable to be imposed on. To consider then the Nature of this Part of the present Case. Here is a young Gentleman, an Infant, known to be so by the Defendant himself. This young Gentleman is placed at an Academy; and that was known to the Defendant likewise. The young Gentleman being at this Academy resorts to the Defendant's House. This House of the Defendant is a Victualling-house, as well as it goes under the Name of a Coffee-house, it being a House of general Entertainment. The Debt is contracted between the 1st of *April* 1735 and the 20th of *September* following, amounting in the Whole to 59 *l.* 8 *s.* The Infant had no Occasion to run any Score at all, being allowed seven Shillings a Week by his Guardian. However, so large a Debt is contracted by him, and the Whole contracted upon Credit. Every *Item* in the Bill is for Meat and Drink for himself, his Friends, and a Dog. Some *Items* of this Bill, his Lordship said, were the most gross he ever saw. On the 4th of *June* 1735 there is one *Item* for *Claret, Champaign and Burgundy*, amounting to 6 *l.* 18 *s.* 7 *d.* On another Day there is a Charge of 12 *s.* for *Barbadoes Waters*; and a Third, of 15 *s.* for keeping the Infant's Dog. The other *Items* indeed are small, and perhaps no great Objection can be made to them; though even as to them it is not proper that they should be run upon Credit. It is admitted that *Gally* knew that *Hobart* was an Infant, and that he was at an Academy; for it is proved by *Montiniack* that he went to the Defendant's

How far the Court relieves against Contracts which Infants enter into, on Account of the Publick.

R

Where a Person shall be said to shew an Intention to conceal a Debt.

How far the Concealing a Matter shall be Evidence of an Imposition.

How far a Note may be set aside in Equity, which is given by a Person after he comes of Age, for Things which he had during his Infancy.

dant's House, and inquired of him how much *Hobart* owed him. The Defendant refused giving him an Account of it, and told him it was not his Business to inquire about it. That was a very impertinent Answer for the Defendant to give; and his giving such an Answer shews that he had a Disposition to conceal the Debt that was contracted. There is another Witness too that gives an Account of the same Kind; he went to the Defendant's House, and asked the same Sort of Question that *Montiniack* did, and it was Half an Hour before he could get an Answer; and then the Defendant said, that it was about 40 s. that was owing him. Certainly this young Man was frequently in Liquor, and easy to be imposed on. And these Instances of Concealment are an Evidence of such Imposition. It has been said, that the Infant used to eat at the Defendant's House because he did not like the Manner of the Victuals being dressed at *Montiniack's* House, it being dressed after the *French* Fashion; but that Excuse is by no Means to be admitted of. There is an Evidence of an Imposition on the Infant from the Nature of the Fact; because otherwise no Pretence can be given why this Debt should be contracted on Credit, and why there should have been a Concealment of the greatest Part of the Demand. These are Circumstances which shew the Defendant's Intention to have been *mala fide*. His Lordship said, That he would now consider what Alteration is made in this Matter by the giving of the Note it self. The Note is given within two Days after the Infant came of Age. On this Part of the Case it has been truly said indeed, that if an Infant takes up Goods, or borrows Money during his Infancy, and after he comes of Age gives a Note for the Money, such Note is good at Law; nay, if the Infant, after he comes of Age, makes barely a Promise to pay the Money, such Promise at Law shall bind him. But though this is so at Law, the Question is, Whether a Case of this Kind may not be so circumstanced, that it may be proper for the Plaintiff, who is an Executor, to be relieved in this Court? It has been said, That the Plaintiff, by being an Executor, is only a

Volun-

Voluntier, and as such is not intitled to Relief. And it is indeed true, that he is in no better Case than the Party himself would have been that gave the Note; but still he may be intitled to Relief. The Question is, Whether, under the Circumstances of the present Case, the Party himself, that gave the Note, would not have been intitled to have been relieved against it? His Lordship said, his Opinion was, that he would; and consequently that the Executor is intitled to the same Relief.

To consider the Fact which this Part of the Case depends on. The Infant, a short Time after the Debt was contracted, goes to his Uncle's at *Norwich*; the Bill is sent him down about two Months before he comes of Age; he came of Age on the 23d or 24th of *March* following; the Note is given on the 26th, at most not above three Days after he comes of Age. That Circumstance of the Note's being given so soon after the Party comes of Age, is always an Ingredient for the Court's giving Relief, where the Debt is contracted under suspicious Circumstances of an Imposition being made upon an Infant. At the Time of giving this Note too no Pretence is there, that any Account was stated between the Infant and the Defendant. It is a strange Thing, considering that this was a Transaction carrying on for the Space of six Months together, that the Infant should not have paid one Shilling upon Account during all that Time. It is not proved that *Hobart* had the Bill before him at the Time of giving this Note. 'Tis indeed sworn that a Bill was delivered before he came of Age; but it is not proved, that the Infant had that Bill by him at the Time of giving the Note. It has been said, That no Case can be cited, that ever an Executor came into this Court and obtained the Relief, which is desired in the present Case. But if a Rule should once be laid down, that in Cases of this Sort there can be no Relief in this Court, there are five hundred Persons about this Town, that would take Advantage of this, and lie in Wait for the Ruin of Infants. And there are Cases that are, in the Reason of

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them,

Upon what
Ground it
is that the
Court re-
lieves, where
a clandestine
Contract is
made in or-
der to defeat
an open
Marriage
Agreement.

Where the
Court gives
Relief on
the Account
of the Pub-
lick.

them, similar to the present Case. One is that of clandestine Contracts, enter'd into in order to defeat the open Marriage Agreement. The Ground of that Case is for the Benefit of the Publick, in order that good Faith may be preserved in the open Marriage Contract. And there is the like Sort of Reason, namely, the Publick Good, for giving Relief in the present Case. Another Instance of the like Kind is that of the Court's relieving young Heirs, who enter into Contracts for the Sale of their Estates before they fall to them. The Court in that Case relieves out of Regard to the Publick Good; and the Publick Good requires that the Court should relieve in such Sort of Cases as the present one. And there are many Instances where, in such Sort of Cases, the Court has given Relief in order to discourage such Sort of Contracts. The Cases cited by the Defendant's Counsel do not come up to the present one. All these Sort of Cases depend upon their particular Circumstances. And in the present Case his Lordship's Opinion was, That the Plaintiff ought to be relieved by having the Note delivered up. On the other Hand, the Defendant must have Liberty to try at Law, how much he can Recover on a *Quantum Meruit* for what he sold to the Infant. The Plaintiff must be obliged to admit Assets, as he has not disputed his having Assets in any Part of his Bill. And so his Lordship was pleased to Decree accordingly.

April 26.

Ashburnham and Bradshaw.

THIS Cause came on about *August* last, and the Point of the Case was this. A Man made his Will before the late Act of Parliament took Place restraining Wills in Favour of Charities; but did not die till after the Act took Place. Lord Chancellor directed the Opinion of all the Judges to be taken, whether this Will was good or not?

I

This

This Cause now coming on in the Paper again, it appeared that all the Judges of *England*, except Mr. Justice *Denton*, who was absent on Account of his Illness, had certified their Opinions according to his Lordship's Direction. The Opinion which they certified was, That the Will was good notwithstanding the late Act of Parliament. And agreeably to this Opinion his Lordship pronounced his Decree, That the Will should be established, and the Trusts of the Charity carried into Execution.

How far a Will shall be said to be good, which was made before the Statute relating to Charities, though the Testator dies after that Statute.

Miller and Moor.

April 26.

William Selwyn having three Daughters (to wit) *Mary*, *Susanna* and *Anne*, and leaving no other Child, and being seised in Fee Simple of the Manor, Lands, Tenements and Hereditaments herein after mentioned, by his Will, dated the 15th of *November* 1686, devised the same in the Words following (*viz.*) "Whereas I am seised in Fee of the Capital Messuage or Scite of the Manor of *Broadwell*, and also of several other Lands and Tenements there, with the Appurtenances, Royalties and Privileges thereunto belonging, I do give and devise the said Messuage, Lands and Premises in *Broadwell* aforesaid in the said County of *Gloucester*, unto my three Daughters, *Mary*, *Susanna* and *Anne*, to be equally divided between them, to hold to them, their Heirs and Assigns for ever. And whereas I am seised of a Messuage called the *Borough House*, with several other Lands and Tenements, with the Appurtenances, situate lying, and being in the Parish of *King's Stanley*, alias *Stanley Regis*, in the said County of *Gloucester*, I do give and devise the same to my said three Daughters, to hold to them, their Heirs and Assigns, immediately from and after the Death and Decease of my loving Wife *Susanna*, for ever. Item, I do give and devise all my Household Goods, of what Nature or Kind soever they be,

" the

“ the one Half Part thereof to my loving Wife, and the
“ other Half Part to my three Daughters, to be equally
“ divided between them. *Item*, All my Ready Money,
“ Bonds, Bills and other Securities for Money whatsoever,
“ and all my other Chattels, Real and Personal, that I
“ shall be possessed of at the Time of my Death, I do
“ give and bequeath unto my said three Daughters, to be
“ equally divided between them.” And then, after some
other Devises and Bequests in the said Will intervening, is
the following Clause. “ And if it shall so please God, that
“ all my three Daughters shall happen to die and leave no
“ Issue of their Bodies to inherit such Estates as in this
“ my Will before devised to them, and not be of Age, or
“ make no other Disposal thereof, that then, and in such
“ Case, my Will is, that all the said Estates, Lands and
“ Tenements, both at *Broadwell* and at *King’s Stanley*,
“ shall be vested and be the sole and proper Estates of my
“ Kinsman *Samuel Birch*, eldest Son of my eldest Sister
“ *Mary*, and also all the said real and personal Chattels by
“ me to my said Daughters herein before bequeathed;
“ and I do hereby give, devise and bequeath the same to
“ the said *Samuel Birch* and his Heirs and Assigns for ever
“ accordingly; provided always that the said *Samuel Birch*
“ shall pay unto every one of all my Sister’s Children, that
“ shall be then in Being at the Time of such my Estate fal-
“ ling to him by Failure of my Issue, the Sums of 100*l.*
“ to each and every of them, which I do hereby give and
“ bequeath to each and every of them.” *Anne*, the young-
est Daughter, died in her Infancy, in the Life-time of
William the Father; *Susanna*, the second Daughter, survi-
ved her Father and Mother, and many Years after she
came of Age, by her Will made a Disposal of her Interest
in the said Premises by the Name of all her Messuages,
Lands, Tenements and Hereditaments; and *Mary* (now
Mary Moore, the Defendant) is now living and married,
and has several Children.

This Cause coming to be reheard on the 14th of July 1738, a Case was made for the Opinion of the Court of King's Bench, wherein were two Questions.

First, Whether *Susanna* and *Mary*, two of the Daughters of *William*, by Virtue of that Will, and by the Death of *Anne*, the younger Sister, in the Life-time of the Testator, took an Estate in Fee Simple or Fee Tail in their respective Shares of the real Estates?

What words in a Will give a Fee Simple, and what a Fee Tail.

Secondly, In Case they took an Estate Tail, Whether any Cross Remainders arose between them?

What words in it give an Estate Tail with Cross Remainders.

This Case being sent to the Judges, they made the following Certificate.

We have heard Counsel on both sides upon the Case, and are of Opinion that the said *Susanna* and *Mary*, two of the Daughters of the said *William Selwyn*, by Virtue of the said Will, and by the Death of the said *Anne*, their younger Sister, in the Life-time of the Testator, took an Estate in Fee Simple in their respective Shares of the said real Estates.

The Judges having certified their Opinions in this Manner, the Cause came now on again.

His Lordship was of the same Opinion with the Judges, and was pleased to Decree accordingly.

Tuffnell and Page.

April 28.

J. C. Tra. Att. 37.

Richard Springett being seised of certain Lands and Tenements, called *Kirby Hall*, in *Henningham*, in the County of *Essex*, Part of which were Freehold and Part Copyhold, devised the same to his three Brothers, *Herbert*, *Anthony* and *William*, and their Heirs, equally between
D them.

them. On the Death of *Richard* it was agreed between the Brothers, that *Herbert* should be admitted alone to such Part of the Premises as were Copyhold; and that he should account to the two other Brothers for such Share of the Profits arising from the Copyhold as they were intitled to. *Herbert* accordingly was admitted alone to these Premises. *Herbert* died without Issue, and on his Death, *Anthony* being intitled to *Herbert's* Share as Heir at Law to him, *William* agreed that *Anthony* should be admitted to the Whole of the Copyhold likewise, in Trust nevertheless that he should account to *William* for such Share in the Profits as belonged to him. Soon afterwards *William* purchased of *Anthony* all the Interest in the Premises which he was intitled to; but, to avoid the Charge of a Surrender, *Anthony* executed a Deed in 1726; whereby he declared, That all the Copyhold Lands by him held of the Manor of *Henningham* Up-lands did belong to his Brother *William*; and that he would at any Time surrender the same to him and his Heirs, as he or they should appoint. After this *William* made his Will in Writing, signed by himself, but without any Witnesses attesting it, wherein was a Clause in these Words. "What Estate I have I intend to settle in this Manner. My Estate in *Kirby Hall*, near *Henningham* Castle, by *Henningham* Town, which is 135 l. per Annum; 128 l. at the Exchequer; 1000 l. Stock at the South-Sea, and 500 l. Stock; all which I give to my dear Brother the Reverend Mr. *Anthony Springett* at *Plumpton*, near *Lawson* in *Sussex*. After his Decease my Desire is, That it should be disposed of after this Manner. To Mr. *William Tuffnell*, the Son of *Samuel Tuffnell*, Esq; at *Langley* in *Essex*, my Estate at *Kirby Hall*." And then the Testator, by his Will, gave the other Part of his Estate to the several Persons therein named. No Surrender was made of the Copyhold to the Use of this Will. *William* died without Issue in 1732; on his Death *Anthony* entered into the Premises, and in 1735 he made his Will; whereby he devised the Estate of *Kirby Hall* before mentioned, together with

with other Premises, to *Page, Campton* and *Penn*, one of which was his Heir at Law; but no Surrender was made to the Use of this Will neither, nor were they ever admitted to the Premises. However, on the Death of *Anthony* they entered into Possession thereof; and thereupon the present Bill was brought by *William Tuffnell*, in the Will mentioned, against the Devisees and Heir at Law, in order to have an Account of the Rents and Profits of the Estate of the Premises, called *Kirby Hall*, that has been mentioned, and to have that Estate decreed to him.

Mr. *Noel* argued on the Part of the Plaintiff; and to shew that he was intitled to these Premises notwithstanding there was no Surrender to the Use of the Will of *William*, and notwithstanding that Will was not attested by any Witnesses, he cited 2 *Vern.* 498, 597.

Mr. *Clark* argued on the same side; and to shew that the Plaintiff was intitled even to a Remainder in Fee in these Premises, he cited 2 *Lev.* 91. and the Case of *Ibotson* and *Beckworth*, determined by Lord *Talbot*, Michaelmas the 9th of his present Majesty. And to the same Purpose was cited *Abr. of Ca. in Eq.* 178.

The *Attorney General* argued on the other side, and for Authority cited the Case of *Miller* and *Mohune*, determined by Lord *King* the 21st of June 1732.

And Mr. *Brown*, on the same side, cited *Cro.* 1. 447.

Lord Chancellor said, That the first Question proper for his Consideration was, Whether the Plaintiff is intitled to any Interest in the Lands in Question? And, secondly, Supposing he is, What that Interest is? The first of these Questions is to be considered in two Lights; one, Whether the Will of a Copyhold Tenant, not attested by any Witnesses, is sufficient to declare the Uses of a Surrender made

Where a Will is not necessary to be attested by any Witnesses.

made to the Use of a Will? And in the next Place, Whether in the present Case, as there was no Surrender at all, this Will, not attested by any Witnesses, is sufficient to give the Trust of the Copyhold to the Plaintiff? To consider this Question in the first of these Lights, it is very certain, that had *William* been admitted to these Premises, and had he surrender'd them to the Use of his Will, the Plaintiff would have been intitled to them notwithstanding the Will was not attested by any Witness. When this Cause was argued a few Days ago, his Lordship said it was very true, that he had some little Doubt upon this Point, not having remember'd, that it was ever precisely determined; but even at that Time he did remember, that it has been held, that the Attestation of three Witnesses is not necessary in Cases of this Sort. However, in those Instances, wherein he has known that Point so determined, to the best of his Remembrance, there always was one or two Witnesses attesting the Will. But though his Lordship had some little Doubt upon this Point at the Time this Cause came on before; yet now he was extremely well satisfied, that a Will of a Copyhold Tenant, not attested even by any one Witness, is sufficient to declare the Uses of a Surrender which he has made. The Case of the *Attorney General* and *Barns*, cited by Mr. Noel out of 2 *Vern.* 597. is an express Authority for that Purpose. And indeed it falls within the Reason of those other Cases, where it has been held, that a Will attested by one or two Witnesses is sufficient in these Sort of Cases. The Reason of those Cases is, that the Party is in by the Surrender, and not by the Will; and that Reason equally holds to give the Party a good Title under the Surrender, though the Will is not attested by any Witnesses at all. So far indeed is necessary, that the Will, in such Case, must be in Writing; but when it is in Writing, and signed by the Party, that is sufficient for such Purpose. To consider then this Question in the other Light which has been mentioned, and his Lordship's Opinion was, That the Plaintiffs were well intitled to the Trust of this Copyhold, notwithstanding there was no Surrender, and

Where a
Person shall
be intitled to
the Trust of
a Copyhold
Estate.

and notwithstanding the Will was not attested by any Witnesses. This is merely the Case of a Trust of a Copyhold Estate, and the Testator could not make a Surrender of it. It has been objected, that the present Case differs from that, where a Surrender is made of a Copyhold Estate to the Use of a Will, by Reason that there the Party is in by the Surrender; whereas in the present Case it has been said, that the Trust of the Estate merely passes by the Will; and therefore it has been urged, that in this Case the Will ought to have been attested by three Witnesses. But his Lordship's Opinion was, That this Point must be so determined in the Case of a Trust of a Copyhold Estate, in Consequence of the former Opinion that he had given in case the Copyhold had not been in Trust; and if such Attestation is not necessary where the Copyhold is not in Trust, it must be determined in Consequence, that it is not necessary where the Copyhold is in Trust. The general Rule may here be applied, *That Equity follows the Law*; and as at Law it has often been determined, that Wills of this Sort need not be attested to convey the legal Estate in the Copyhold, so it must be determined likewise, that such Attestation is not necessary to convey the Trust of the Copyhold. This Court is never more strict in requiring Ceremonies to pass the Trust of an Estate, than it is to pass the legal Interest in it; And as to convey the legal Estate in the Copyhold, this would not have been necessary, by the same Reason it shall not be necessary to convey the Trust of it. The next Question proper to be consider'd is, What Estate in the Premises the Plaintiff is intitled to? And his Lordship's Opinion was, That he was intitled to an Estate in Fee, as *Anthony* is dead. The Beginning of the Will is, "What Estate I have (I intend)"; and did indeed the Will rest only on that, that would not have been sufficient to have shewn the Party's Intention to have given the whole remaining Estate in the Land to *William Tuffnell*. But then the Will goes on with saying, "All which I give to my dear Brother the Reverend Mr. *Anthony Springett*, at *Plumpton*, near *Lawson* in *Sussex*. After

“ter his Decease, my Desire is, that it should be disposed
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that the Word *Estate* in that Clause of the Will relating to
William Tuffnell, is sufficient to convey, not only the Land
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for this Purpose they relied on the general Cases on this
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Freeman and Bishop.

April 28.

Robert Bartley Freeman, being between Twenty-two and Twenty-three Years of Age, became acquainted with *Bishop*, who was a Jockey, and during the Space of a Twelve-month's Time bought thirteen Horses of him. His Method was, not to buy above one at a Time ; but he used to ride them hard, soon grew tired of them, and then resold three of them to the Defendant at much smaller Prices than he contracted for them. He paid no Money down, but the Whole was run upon Credit ; and at the Time that a Horse was bought *Bishop* frequently lent him a little Money too ; and then a Note was given for the Price contracted for the Horse, and for the Money at the same Time lent. Some of these Horses were at high Prices, 42 *Guineas* was the Price of some of them, and 40 *l.* the Price of others ; however, it was sworn that the Horses were not sold to him at a higher Price than they were really worth, except two of them ; and even as to them, one of them was only sold at about 2 *Guineas* above the Market Price, and the other about 3 *l.*

At the Time these Dealings were carried on *Freeman's* Father was alive, and had a good Estate ; *Freeman* himself lived

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At the Time these Dealings were carried on *Freeman's* Father was alive, and had a good Estate ; *Freeman* himself lived

lived with his Father, and was only intitled to a Reversion expectant on his Father's Death; however, as he had this Expectancy, and was his Father's eldest Son, and was a Favourite of his Mother, upon these Accounts it was, that *Bishop* was contented to trust him. The whole Money at last amounted to 300*l.* and thereupon he consented to mortgage his Reversion; and at the same Time it was agreed between them, that the Mortgage should be writ by a common Person in a Running Hand, and not by any Attorney in the Neighbourhood. The present Bill was brought by *Freeman* against *Bishop*, in order to be relieved against this Mortgage, on Payment of what was *bonâ fide* due on Account of the Horses, and the Money that was lent to him.

How far a young Heir's being intitled to a Reversion, is no Reason why the Security, which he has entered into, should not be relieved against.

Where a young Heir has no Subsistence but from his Father, and the Court finds that on that Account Advantages have been taken of the Difficulty the young Heir lay under, in most of those Instances they have relieved.

What is Evidence of actual Fraud made upon a young Heir.

Lord Chancellor said, That his Opinion was, the Plaintiff was intitled to Relief. He said it had been objected, that the present Case was not within the ordinary Rule of the Court, of relieving young Heirs against hard Agreements which they enter into; for that here the Plaintiff had a reversionary Estate, expectant upon the Death of his Father; but his Lordship observed, that that Circumstance would make no Difference. The Court in these Cases does not enter into Inquiries of that Sort; the Point that they regard is, That the Heir is such a one as, in his Father's Life-time, had no proper Subsistence but from his Father; and where in such Cases the Court has found, that Advantages have been taken of the Difficulties the young Heir lay under, in most of those Instances they have relieved. In the present Case, at the Time these Dealings were carrying on between the Plaintiff and Defendant, the Plaintiff was not above Twenty-two or Twenty-three Years of Age. The Reason acknowledged by the Defendant for his trusting him was, That his Father had a good Estate, that he was intitled to a Reversion expectant on his Father's Death, and that he was a Favourite of his Mother. Besides, abstracted from these Circumstances, the Nature of the Transaction speaks a Fraud. Here is a young Gentleman entering into Bargains with the Defendant for Horses.

It has been said, Equity will not set aside every Contract of this Sort, where a Bargain is to give a little more for a Horse than he is worth. And true indeed it is, that if this had been a Contract for a single Horse, tho' the Price agreed for was beyond what he was worth, a Court of Equity would not interfere and rescind the Bargain. But what is the Nature of the present Dealing? Here are thirteen Horses bought in a Twelve-month's Time, most of them at very high Prices; 42 *Guineas* contracted for some of them, 40 *l.* contracted for others; three of them resold to the Defendant at much lower Prices than they were bought in at. A Transaction of this Kind is rather a Trading in the way of Horses than any thing else. The Defendant too has not dealt with the Plaintiff in the common way of selling Horses, by taking ready Money of him, but upon Credit. At the Time of these Contracts for the Horses Money is taken care to be lent; this is a common way of drawing young Persons in to supply their Extravagancies. Another Circumstance, giving Ground for Relief in this Case, is, that here is a Mortgage given for 300 *l.* At the Time the Mortgage was made, there is no Proof, that any Account was stated; no particular Proof is there of what Sums of Money were really lent; besides, there is a Circumstance of a Concealment intended. The Mortgage was to be writ by a common Person in a Running Hand, and not by any Attorney in the Neighbourhood. Why was it to be writ in a Running Hand, if a Concealment was not designed? For these Reasons his Lordship was of Opinion, that the Mortgage should only stand as a Security for what was really due on Account of the Money lent, and on Account of what was due for the Horses. To ascertain what was due for the Horses, the Defendant was to have Liberty to bring his *Quantum Meruit*. And so his Lordship was pleased to Decree accordingly.

Where a Deed shall only stand as a Security for what shall be proved to be due upon a *Quantum Meruit*.

April 30.

Glanville and Paine.

ON the 16th of March 1684, previous to the Marriage of *Abraham Paine* with *Rose* his Wife, Articles were enter'd into, whereby, in Consideration of 1000*l.* Portion, that *Abraham* was to have with *Rose*, *Abraham* agreed to make a Settlement of 30*l. per Annum* on *Rose* for Life, by way of Jointure, and to the Heirs of her Body by *Abraham* begotten. On the same Day a Settlement is made by *Christopher*, the Father of *Abraham*, of certain Freehold Lands; the Value whereof did not appear. This Settlement is made by *Christopher* on the one Part, *Abraham* and *Rose* on the other Part, and Trustees on the third Part. This Settlement is, That as well for and in Consideration of the Marriage intended to be had between *Abraham* and *Rose*, and for and towards Settling Part of a Jointure on *Rose*, and for settling the Estate in the Name and Blood of *Christopher*, the Use of one Moiety is to *Abraham* for Life, the Remainder to *Rose* in Part of her Jointure, the Remainder to the Heirs of the Body of *Rose* by *Abraham* begotten. As to the other Moiety, it is to *Christopher* for Life, the Remainder to *Mary* his Wife for Life, the Remainder to *Abraham* for Life, the Remainder to the Heirs on the Body of *Rose* begotten. In this Settlement there is a Power to make Leases in this Manner; That after the Death of *Christopher* and *Mary*, it shall be lawful for *Abraham* to demise the Premises for three Lives, or any Number of Years, determinable on three Lives, so as not less than the Rent of 11*s. per Annum* should be reserved. Another Settlement is made, on the same Day, of a Leasehold Estate; it recites the Marriage agreed on, and that the Husband was to receive a Portion of 1000*l.* of his Wife; namely, 650*l.* down, and 350*l.* more as soon as he should settle 30*l. per Annum* on his Wife for Life, by way of Jointure, and to the Heirs of her Body begotten by *Abraham*, and over and above what was already settled.

settled. On the 16th of *April* following the Marriage ensued; the same Day the Father of *Rose* gave a Bond for securing the Payment of the 350*l.* in Case the 30*l. per Annum* should be settled, besides what was already settled. In 1689 *Abraham* makes a Settlement of a Leasehold Estate of 75*l. per Annum* for the Benefit of his Wife for her Jointure; 'tis limited to Trustees to permit *Abraham* to receive the Profits for his Life, the Remainder to *Rose* for her Life, the Remainder to such second Husband as she shall afterwards marry, the Remainder to the Executors and Administrators of *Abraham*. *Rose* died in 1736; after her Death *Abraham Paine* took to himself the Custody of all the Deeds. By this Marriage there was Issue one Son; the Son died, and left a Daughter *Mary*, who intermarried with *Glanville*; and thereupon the present Bill was brought by *Glanville* and his Wife against *Abraham Paine*, in order to compel him to make a Settlement of the 30*l. per Annum.* in Pursuance of the Marriage Articles.

Mr. Talbot argued on the Part of the Plaintiff, and for Authority cited 1 *Vern.* 452.

Lord Chancellor said, That his Opinion was, the Plaintiff was intitled to Relief. 'Tis very plain, that here was a Portion of 1000*l.* which was agreed by the Articles to be paid to *Abraham*. These Articles were made in 1685, and at that Time Money was of much more considerable Value than now it is. 'Tis very plain too, that by these Articles a Settlement was intended to be made for the Benefit of the Issue of the Marriage, as well as for the Benefit of the Wife. But if Things are to remain as they are, here will be hardly any Provision for the Issue at all. 'Tis indeed true, that the Clause of the Heirs of the Body is interlined in the Marriage Articles, and in the Attestation by the Witnesses no Notice is taken of this Interlineation; but considering that here is the like Clause of a Provision for the Heirs of her Body inserted in the Settlement of a Free-
Where the Court will decree a Settlement to be made in Pursuance of Articles.
Where an Interlineation in a Deed shall not avoid it,

Where a
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Freehold Estate on the same Day that the Articles bear Date, and considering that the Bond takes Notice of the same, his Lordship said, that he must take it, that this Interlineation was duly inserted; and if this was so, there is no Pretence to say, that the Settlement of the Freehold Estate, made on the same Day with the Articles, can be any Performance of them, it being expressly declared by that Deed, that it was only made for Part of a Jointure. Besides, it is reasonable to believe that this Freehold Estate was but of small Value, there being a Power to make Leases in it, reserving not less, as the Deed says, than 11 s. *per Annum*; nor can the Settlement of the Leasehold, made on the same Day with the Articles, be any Performance of them, it being declared by that Deed, that the Leasehold was to be settled over and above what was settled before. A Question has been, Whether the Settlement which was made of another Leasehold Estate in 1689, shall not go in Satisfaction of these Articles; but there is no Foundation to say, that it can be any Satisfaction with regard to the Issue, this Leasehold Estate being limited to the Executors of the Husband after the Death of the Husband and Wife. Had indeed that Settlement been on the Issue of the Marriage instead of limiting the Remainder to the Executors, his Lordship said, that after this Length of Time he would not have relieved; but as it was limited to the Executors of the Husband, that Settlement cannot be considered as a Performance of the Articles. Upon these Grounds his Lordship said, It was clear that the several Deeds can be no Performance of the Articles, provided the Construction of the Articles contended for is true; namely, that under these Articles the Issue were intended to be Purchasers, and that the Limitation ought to be in strict Settlement to them. It becomes necessary then to consider the Construction of the Articles; and as to that the Principle is clear, that in general, where in Marriage-Articles a Settlement is agreed to be upon the Parties and the Heirs of their Bodies, the Settlement shall be made in strict Settlement. It has been said, That the present Case differs

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differs from that general Rule; because, by the Articles, the Jointure is to be made on the Wife for Life, the Remainder to the Heirs of the Body of the Wife by the Husband begotten, without any Limitation being made to the Husband. But the present Case is the stronger for want of the Limitation to the Husband being inserted; since by this Means it would not be in the Power of the Husband to destroy the contingent Remainder made to the Issue. Another Objection has been made, that these Articles have a plain Reference to the Settlement of the Freehold Estate, and by that Settlement the Husband is made Tenant in Tail; and therefore it is contended, that these Articles shall have the same Construction likewise. But on the Face of that Settlement there appears to have been a plain Blunder in making the Husband Tenant in Tail, there being a Power inserted in it, that he should have Liberty to make Leases for three Lives; which Power, had he been intended to have been Tenant in Tail, he would have had by the Statute of *H. 8.* The same Mistake appears too from the Consideration in the Deed, which was, that the Estate should be settled in the Name and Blood of *Christopher* the Father; for it was not a proper Means of obtaining the End, to give an Estate Tail to the Son. And because the Conveyancer is mistaken in drawing the Settlement, that will be no Reason, that the Court is to mistake likewise. The Case of *West* and *Eresy*, a few Years ago, in the *House of Lords*, is extremely applicable to the present Purpose. That Case went farther too than the present one; for there, by the Settlement as well as Articles, the Husband was made Tenant in Tail; and yet the *House of Lords* directed, that the Husband should be Tenant for Life, only limiting the Remainder in strict Settlement. And so his Lordship was pleased to decree accordingly.

May 1.

Havers and Havers.

A *Braham Havers* made his Will, and thereby bequeathed to *Anne* his Wife the Residue of his personal Estate, making her his Executrix. *Anne* the Wife died, and left behind her one Child, *Anne* an Infant, who was the only Issue of that Marriage. *Anne* the Infant, in this Manner became intitled to a personal Estate of the Value of six hundred Pounds, and to Arrears of Rent of a real Estate. The Grandmother of the Infant, who was her next of Kin, was appointed Guardian to her; and upon this Account the Surrogate granted to her Administration *durante minore Ætate* of the Infant, though she was an Alms-woman, and in very necessitous Circumstances. On granting this Administration the Grandmother however found Sureties, who enter'd into an Administration Bond, in the Penalty of 200 *l.* conditioned for her duly administering the Effects of the Intestate; and after this Grant of Administration was perfected, she gave a further Surety in 600 *l.* to the same Purpose. After this the Grandmother took out Administration *de bonis non* to the Father; and having these several Administrations committed to her, she thought proper to bring Actions in order to call in the Securities that were owing to the Estate of the Father and Mother. Thereupon a Bill was brought by the *Prochein amy* of the Infant, in the Name of the Infant, and by the several Defendants in those Actions against the Grandmother, praying an Injunction to stay her Proceedings in those Actions, and that she might be compelled to bring into Court for safe Custody the Money of the Infant, that she had got into her Hands. To this Bill an Affidavit was annexed of the Truth of the Contents of it.

The Defendant put in her Answer, and thereupon the *Attorney General* now moved, That a Receiver might be appointed of the Infant's real and personal Estate, and
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came to shew Cause why the Injunction, which had been granted, should not be dissolved.

Lord Chancellor said, That he neither liked the Manner of the Bill, nor the Defence which had been made against it. 'Tis an odd Thing for Debtors to an Estate to make themselves Plaintiffs in a Cause, under a Pretence of taking Care of that Estate, and to pray an Injunction to stay the Proceedings in Actions commenced against themselves; nor did he like the Defence that had been made to this Bill, That a Woman, who is under necessitous Circumstances, should insist upon keeping the Possession of an Infant's Estate. She appears to be very poor, and on that Account was very unfit to have been intrusted by the Ecclesiastical Court with the Administration during the Minority of the Infant; 'tis incumbent therefore on this Court to take Care of the Infant's Interest. It has been said, that the present Bill is not proper, because the Ecclesiastical Court has the sole Right of determining concerning the Fitness of the Person, whom Administration is to be granted to; but it by no Means follows from thence, that the Nature of the present Bill is not a proper one. Where this Court sees Reason to think, that there will be a Misapplication of the Effects of the Intestate, and an Abuse and Wasting, to the Prejudice of an Infant, by a limited Administrator, who is only a Trustee for the Infant, it is incumbent on this Court to take Care, that the Infant be not prejudiced; and in such Case, if they see the Exercise of a Jurisdiction by a Surrogate, to the Infant's Prejudice, this Court will interfere. The Administration during the Minority of the Infant, which has been granted in the present Case, his Lordship said, has been granted in the most careless, slovenly and scandalous Manner, that he ever saw. This is an Administration, which the Grandmother had not any Right to; and that was a Circumstance, which he thought was of very considerable Weight in the present Case. It was incumbent therefore upon the Surrogate to have taken Care, that this Administration should

An Administration *durante minore Ætate* ought not to be committed to one that is very poor, though she is Guardian, and next of Kin to the Infant.

Where this Court sees Reason to think, that there will be a Misapplication of the Effects of the Intestate, and an Abuse and Wasting, to the Prejudice of an Infant, by a limited Administrator, who is only a Trustee for the Infant, it is incumbent on this Court to take Care that the Infant be not prejudiced.

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Administra-
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Administra-
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Where the
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a personal
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have been granted to a responsible Person. At the Time of granting this Administration, Security is only taken in the Sum of 200 *l.* Under this Administration the Grandmother was in hopes of possessing herself of the whole Estate of the Infant. And as to what is said of her being Administratrix *de bonis non* to the Father, and under that Pretence justifying the Actions, which she has brought in order to get in the Estate of the Father, the obtaining that Administration was only an After-thought, in order to substantiate the Proceedings in those Actions. The Infant is intitled to a personal Estate of the Value of 600 *l.* besides the Arrears of Rent of a real Estate; and yet so little Care has been taken of her Interest, as to grant the Administration, during her Minority, to an Alms-woman, with the Security only of 200 *l.* This Negligence of taking so small a Security has been endeavoured however to be supplied by the taking of another Bond in a larger Sum. But by the taking of the first Bond, and the granting the Administration under it, the Surrogate had *functus Officio*; and therefore his Lordship said, he did not see what Authority he had to take this second Security. For these Reasons his Lordship said, that he would direct that a Receiver should be appointed, both of the real and personal Estate of the Infant. He would direct farther, that the Master should see what Securities were proper to be called in, and that the Receiver should put such Securities in Suit. He would direct farther, that the Receiver should carry on, in the Name of the Administratrix, the Suits which are already begun, and should commence any other Suit in her Name, indemnifying the Administratrix; and that Costs should be taxed the Administratrix as far as she has proceeded in these Suits. However, his Lordship said, that the Cause for Continuance of the Injunction should be disallowed. And so his Lordship was pleased to order accordingly.

Davile and Peacock.

May 8.

THE Bill set forth, that *John Warcop* made his last Will and Testament in Writing in 1731, thereby devising certain Lands to Trustees, in Trust to permit *Philadelphia* his Wife to take the Profits for her Life; except the yearly Sum of 500*l.* issuing thereout, which he gave to his Daughter *Sarah*, to be paid to her sole and separate Use, notwithstanding her Coverture. The Testator farther directed, that after the Death of *Philadelphia* his Trustees should pay all the Rents and Profits, except of his Estates at *East Tanfeild*, to *Sarah*, for her respective Use for her Life, at two Half-yearly Payments, to be computed from *Philadelphia's* Decease; and that *Sarah's* Receipt should be a sufficient Discharge, notwithstanding her Coverture. He directed, that after *Sarah's* Death the Trustees should stand seised of all these Lands, except the Estate at *East Tanfeild*, to the Use of the Issue of the Body of *Sarah*, and in Default of such Issue, to the Use of *Priscilla*, another of the Testator's Daughters, in Fee. In this Will there was a Power given to *Sarah*, by her last Will in Writing, to dispose of such Part of the Lands, which lay at *Ripon*, notwithstanding her Coverture.

The Bill farther charged, That *John Warcop* died, and after his Death *Sarah*, by her last Will, duly signed and published in the Presence of three Witnesses, dated the 21st of *February* 1724, reciting the Purport of her Father's Will, did give and devise to the Plaintiff's Father and his Heirs all her Right, Title and Interest whatsoever, in the Lands at *Ripon*; That the Defendant had got into Possession, and refused to come to any Account with the Plaintiff's Father in his Life-time, or with her since his Decease, for the Rents and Profits of the same. Whereupon she, in order to recover Possession of the Premises in *Ripon*, was obliged to bring an Ejectment against the Defendant, and,

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after a full Trial, recover'd Possession of the same. Thereupon the present Bill was brought by *Elizabeth Davile* against *Thomas Peacock* and *Priscilla* his Wife before mentioned, and against several others, praying, that they may come to an Account with the Plaintiff, and pay her such Rents and Profits of the Premises, as she has a Right to receive; and that the Defendants *John Peacock*, and *Thomas Peacock* and his Wife may deliver to the Plaintiff all the Title-Deeds and Evidences belonging to the Premises; and that her Title at Law thereto may be established, and she quieted in Possession.

The Defendants, by their Answer, disputed the Validity of the Will of *Sarah*, and brought an Ejectment themselves, in order to dispute the Force of it. They likewise instituted a Suit in the Prerogative Court of *York* against the present Plaintiff, to compel her to bring the Will of *Sarah* into that Court, in order that it might be duly proved. Thereupon, the 28th of *February* last, a Motion was made to this Court, praying, that the Injunction which had been obtained, till the coming in of the Answer, might be extended to stay Trial in the second Ejectment, and the Proceedings, which had been commenced in the Prerogative Court.

The Court gave no final Opinion in this Matter at that Time; but ordered, that the Plaintiff's Time for shewing Cause against the Injunction should be enlarged, and that Proceedings in the mean Time should be stayed.

On the 3th of *March* last the Matter came on again, and then an Order was made generally, whereby all Proceedings were directed to be stayed. But notwithstanding this Order, the Defendant *Priscilla* caused Sentence of Excommunication to be read and published against the Plaintiff, for not producing the Will of *Sarah* in the Ecclesiastical Court, in order to be proved.

On the 15th of *April* last the Matter came on again, and then the Order, that the Court was pleased to make, was, That the Plaintiff's Time for shewing Cause against the Order of the 28th of *February* should be farther enlarged; and that all Proceedings at Law, and in the Ecclesiastical Court at *York*, for the Matters here in Question, should be in the mean Time stayed. And it was farther ordered, That the Defendant *Thomas Peacock*, and *Priscilla* his Wife, should shew Cause why they should not stand committed to the *Fleet* for Breach of the Order of the 8th of *March* last. And it was farther order'd, That the Benefit of the Plaintiff's Motion, for extending the Injunction to stay Trial in the second Ejectment, and also to stay the Defendant *Priscilla Peacock's* Proceedings in the Ecclesiastical Court at *York*, touching the Matters in Question, be saved until the same Time.

This Matter now coming on again, the *Attorney General* moved, that the Injunction might be extended to stay Trial in the second Ejectment; and that *Priscilla* might be committed for her Contempt in proceeding to excommunicate the Plaintiff, contrary to the Intention of the Order of the 8th of *March*, which has been mentioned.

Lord Chancellor said, That there were four Things for his Consideration. The first of these relates to the Regularity of the present Injunction; and if the Matter had been *res integra*, he should have doubted whether the present Injunction was regular, by reason that it was granted without having been Part of the Prayer of the Bill. And in these Injunctions, for want of an Answer, the Plaintiff must pray it by his Bill, otherwise he will not be intitled to it; and that has been often determined. And it is not sufficient in such Cases, that the Plaintiff should pray general Relief. But then the Question is, Whether this Defect in granting the Injunction originally, is not cured by what the Defendant has done? For the Defendant, instead of coming to take Advantage of this Irregularity, has put in

How far an Injunction shall not be granted, by Reason that it is no Part of the Prayer of the Bill.

Where a Defect in granting an Injunction originally shall be cured by the subsequent his Proceedings.

Where a Defendant shall not be committed for proceeding in the Ecclesiastical Court contrary to an Injunction.

Where an Injunction shall not be construed to extend to the Ecclesiastical Courts.

his Answer, and moved in the common Form, that upon coming in of the Answer the Injunction may be dissolved; that is submitting to the Regularity of the Injunction. And there are many Cases, both at Law and in Equity, where a Matter is irregular originally, and yet that Defect is cured by what is done subsequent to it. But besides this Question concerning the Irregularity of the present Injunction, there are three other Questions proper to be considered. One of them is, Whether there is a Ground, on the Merits of the Case, to continue the Injunction till the Hearing? Another, Whether, in the Nature of it, it shall be ordered to extend to stay the Proceedings in the Ecclesiastical Court? And lastly, Whether, on the Circumstances of the present Case, there is a Ground to commit the Defendant *Priscilla* for what she has done? The last of these Questions, his Lordship said, he should lay out of the Case; because it is not pretended, that she has carried on any Proceedings in the Ecclesiastical Court subsequent to the Order, whereby she was expressly stayed from carrying them on. At the Time she carried those Proceedings on there was only the general Order depending, whereby Proceedings were directed to be stayed. 'Tis hard to commit a Party for carrying on Proceedings in the Ecclesiastical Court contrary to such general Words of an Order made by this Court. If the Injunction had been intended to have stayed the Proceedings in the Ecclesiastical Court, that Court should have been expressly mentioned in the Order for the Injunction. To consider then the Merits of the Case, Whether the Injunction ought to be continued till the Hearing of the Cause? And on the Nature of this Case 'tis best for all Parties, that it should. Here is a Claim by the Plaintiff, under a Power given to a Feme Covert to dispose of an Estate by a Will, notwithstanding her Coverture. On the other side, here is a Defendant claiming this Estate contrary to this Power, insisting, that the Plaintiff has no Title under it. By the original Will, under which the Power was created, the Devise of the Estate was made to Trustees. It is a doubtful Point, whether in the Issue there

there is a Use executed, or whether it is a bare Trust for them. With regard to the Estate for Life given to *Sarah*, it is a plain Trust, because the Estate is given for her separate Use; and was it not for a Trust being raised, that separate Use could not be supported. The Matter is indeed more doubtful with regard to the Issue, whether this is not the Trust of an Estate, even as to them likewise? And his Lordship rather inclined to think, that it was. However, he said, that he would only continue the Injunction till the Hearing of the Cause, upon these Terms; That the Plaintiff should consent to deliver Possession, as the Court should direct at the Hearing. The Question remaining to be considered is, Whether the Injunction should be directed to extend to stay the Proceedings in the Ecclesiastical Court? And his Lordship's Opinion was, That it should not. He said he did not see any Reason indeed for proceeding in the Ecclesiastical Court, in order to have the Will of *Sarah* proved; nor did he, on the other hand, see, that this Court could grant an Injunction to stop their Proceedings. The Will is only of Lands, and on that Account not proper for the Ecclesiastical Court to prove it. In the next Place, it is not so properly a Will as an Appointment; and he did not know, that the Ecclesiastical Court had a Power, in such Case, to grant a Probate of it. However, this does not give a Court of Equity a Jurisdiction to grant an Injunction. If any Relief is to be had in such Case, the proper one is, to apply to the Courts of Common Law for a Prohibition. Courts of Equity do not grant Injunctions where the Ecclesiastical Court proceeds without Jurisdiction, but where there are some equitable Circumstances between the Parties. And so his Lordship was pleased to order accordingly.

What shall be taken to be a Trust, and not a Use executed.

Where the Court will not direct, that an Injunction should stay the Party from proceeding in the Ecclesiastical Court.

How far the Ecclesiastical Court has no Authority to grant Probate of an Appointment by a Feme Covert.

May 9.

Francklyn and Fern.

N*ehemiah Fern* being indebted to *Young* in 300*l.* *Young* threaten'd to arrest him; but to prevent this, *Nehemiah* propos'd to make an Assignment to him of a Lease, that he was in Possession of. *Young* agreed to this; but it was not fully settled between them, whether the Assignment, that was to be made of this Lease, was to be an absolute one in Discharge and Satisfaction of the 300*l.* or whether it was to be redeemable on Payment of the 300*l.* with Interest. However, *Young* gave Directions for drawing of the Assignment absolutely, and it was drawn in that Manner accordingly. When *Nehemiah* came to peruse it, he objected against its being drawn in that Manner, and insisted, that it should be made Redeemable on Payment of the Sum which has been mentioned. The Parties disagreeing in this Matter amongst themselves, *Josiah Fern*, the Brother of *Nehemiah*, was brought in to see if he could not adjust the Matter between them; and at last the Agreement enter'd into between them was, That *Josiah* should become bound to *Young* for the Payment of this Money; that the Name of *Young* should be struck out of the Assignment, and in the Room of it, that the Name of *Josiah* should be inserted; that *Nehemiah* should execute this Deed, only with that Alteration made in it; but that there should be an Indorsement on the Deed, purporting, that the Deed was made to indemnify *Josiah Fern* against the Bond before mentioned. Accordingly the Deed being thus altered, was executed under Hand and Seal by *Nehemiah* to his Brother *Josiah*, and such Indorsement made as has been mentioned, signed with the Hand of *Nehemiah*. This Transaction passed upon the 2d of April 1734. On the 4th of that Instant *Nehemiah* signed a Writing, whereby he directed the Tenants to attorn to *Josiah*; on this same Day *Josiah* was put into Possession, the Tenants did attorn to him, and it was sworn by *Josiah*, in his Answer, that

on this Day it was agreed between his Brother and him, that the Assignment, which had been made, should be absolute to him, without any Condition of Redemption. But this Part of his Answer was falsify'd by a Witness, who swore, that *Josiah* afterwards declared, that *Nehemiah* was a Fool for not making the Assignment absolute to him. On the 7th of this Instant *Nehemiah* became a Bankrupt. A Commission issued upon the 27th; and soon afterwards a Meeting was had by the Creditors, to consider whether the Assignees should bring a Bill against *Josiah*, in order to redeem this Leasehold Estate. But the Majority of the Creditors were of Opinion, that it was not adviseable to do it. Accordingly the Assignees could not do it by an express Clause in the Statute of 5 G. 2. relating to the Bankrupts. However, the rest of the Creditors thought, that it was adviseable to bring it; and thereupon they brought the present Bill, in their own Names, against *Josiah Fern*, and against the Assignees, praying to be let in to the Redemption of this Lease. The Assignees, by their Answer, sided with the Plaintiffs, and said, that they were desirous it should be redeemed. *Josiah* opposed it, and submitted it by his Answer, that it was an absolute Purchase, by Reason of the Agreement on the 4th of *April*, which has been mentioned.

Mr. *Chute* argued as Counsel for *Josiah*; and to shew that such Bill could not be brought by Creditors without Collusion between the Assignees and *Josiah*, he cited the Case of *Bickley* and *Dorrington*, and that of *Monk* and *Pomfret*; both of them lately determined by the present Chancellor.

Mr. Justice *Parker*, who sat for the Lord Chancellor, said, his Opinion was, that the Plaintiff was intitled to Relief. He said, there were several Questions in this Cause, which were proper to be considered. The first of them is, Whether the Assignment made by *Nehemiah* was to be considered as an absolute Sale to his Brother, or Whether it was

What shall be considered as an absolute Sale, what only as a Mortgage.

only

What shall
not amount
to a Release
of an Equity
of Redemp-
tion.

How far
Creditors of
a Bankrupt
shall be al-
lowed to
bring a
Bill against
a Mortgagee
of the Bank-
rupt, ma-
king the As-
signees De-
fendants.

What Per-
sons only
shall be al-
low'd to
bring a Bill
to redeem.

How far a
Creditor to
the Estate
of a Testa-
tor shall be
allowed to
bring his
Bill against
a Debtor to
that Estate,
making the
Executor
Defendant.

only a Mortgage? It cannot be doubted but when this Assignment was made, on the 2d of *April*, it was then intended only as a Mortgage; for though the Assignment was, on the Face of it, absolute, and that under Hand and Seal, yet the Indorsement, though only signed with the Hand-writing of the Party, was sufficient to shew, that in Equity, at least, it was only a Mortgage. And if this was a Mortgage on the 2d of *April*, the Question is, Whether the Transaction on the 4th of that Instant has alter'd the Nature of it? And his Opinion was, that it has not. It has been said by the Counsel for *Josiah*, That the Writing, which *Nehemiah* signed upon that Day, amounted to a Release of the Equity of Redemption; but that Writing is no more than a Direction to the Tenants to attorn to the Mortgagee. The next Question proper to be consider'd is, Whether the Creditors of the Bankrupt have a Right, in the present Case, to bring their Bill against the Mortgagee, to compel him to redeem, or be foreclosed, making the Assignees of the Bankrupt Defendants? And his Opinion was, that they had. It is very true, that the Rules laid down in the Case of *Bickley* and *Dorrington*, and in that of *Monk* and *Pomfret*, are very right; namely, that in general no Person shall be allowed to come into Equity for a Redemption, but he that has the legal Estate of the Mortgagor. So if an Executor is willing to get in the Debts of the Testator, there is no Foundation for a Creditor to bring his Bill for that Purpose; and therefore, in general, where there are proper Persons to get in the Estate of another, a Court of Equity will not suffer either the Creditors of the Testator, or the Creditors of a Bankrupt, to bring a Bill in Equity, in order to get in that Estate. But if an Executor, or Assignees under a Commission, will collude with a Debtor, there is no Doubt but a Creditor may bring his Bill in order to take Care of that Estate, and charge the Assignees or Executors with such Collusion. In the present Case, here was a Meeting of the Creditors of the Bankrupt, to consider whether it was proper, that the Assignees should bring a Bill in order to be let into a Redemption of his Estate. The

Majority

Majority of the Creditors were of Opinion, that it was not. The Assignees thereupon could not bring this Bill; and if Assignees refuse to bring a Bill, that is for the Benefit of the Bankrupt's Estate, any Creditor has a Right to bring such Bill, under Peril of Costs. The remaining Question proper to be consider'd is, On what Terms the Redemption is to be granted? It has been contended by the Counsel for the Plaintiffs, that *Josiah Fern* has not only forfeited his Costs by insisting upon this Assignment as an absolute Purchase, but that he ought to pay the Plaintiffs the Costs of this Suit. Now, as to that the Judge was pleased to say, That he thought it would be going too far, to make *Josiah* pay the Costs of this Suit; but, on the other hand, his Opinion was, That *Josiah* has forfeited his Costs. In the first Place, here is an Indorsement under his own Hand, whereby he has admitted the Assignment to be a Mortgage; and in the next Place, here is a Witness falsifying his Answer. In the present Case the Direction must be, that the Assignees, in the first Place, shall have Liberty to redeem, and in Default thereof, that the Plaintiff shall have this Redemption. And so he was pleased to Decree accordingly.

On what Terms a Redemption shall be decreed.

Where a Mortgagee shall not be allowed his Costs.

Where a Mortgagee shall not be decreed to pay Costs.

The Attorney General, at the Relation May 13.
*of * * * * ** *against the Mayor*
and Aldermen of the Borough of Staf-
ford.

IN the Town of *Stafford* there had been, at various Times, a great many Sums given to the Corporation, with Directions to them, that they should lend out 5 *l.* or 10 *l.* at a Time to the poorer Sort of the Inhabitants. Some Part of this Money was directed to be lent them at full Interest, some Part of it at half Interest, and other Part of it without paying any Interest at all. The Whole of this Money amounted to 590 *l.* and from Time to Time

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had

had been lent out amongst the poor Inhabitants, according to the several Directions of the Charities. However, the Corporation being sensible, that a good Part of this Money was likely to be lost by being lent out in this Manner, in the Year 1714 they thought proper to call it in. And when they had called in as much as they were able to do, they found, that there was a Deficiency of 140*l.* The rest of the Money, which they were able to get in, continued in their Hands for some Years. And then they advised with Lord *Macclesfield*, who was their high Steward, what Method was proper to be taken in order to make up that Deficiency. The Method, that Lord *Macclesfield* advised them to take, was, that they should put out the Money which they had in their Hands upon Interest, to any Persons upon good Security; and that they should let that Interest accumulate, till the whole Sum amounted again to 590*l.* This Method they accordingly took, and in the Year 1725 the whole Sum was made up again 590*l.* When they had made up this Sum of Money again, they advised with another Person what Method was proper to be taken to let the poor Inhabitants receive the Benefit of this Money. The Method, which this other Person advised them to take, was, That they should lend out the Whole upon Interest, to any Person on a good Security; and that they should divide the Interest amongst the poor Inhabitants, in such Manner as they thought proper. This Method they likewise observed, and distributed 21*l.* which was Part of the Interest they received from this Money, amongst Forty-two of the poor Inhabitants, at 10*s.* *per* Head. But this Method being thought to be an improper one, in not answering the Intentions of the Charities, a Commission of Charitable Uses was sued out by *Walker*, in order to compel the Corporation to lend out the 590*l.* in small Parcels, to the poor Inhabitants, according to the Directions of the Charities. The Commissioners decreed, that they should do so; and ordered the Corporation to pay the Costs of the Commission. To this Decree the Corporation took

Exceptions; but those Exceptions were never argued, the Corporation agreeing to pay the Prosecutor out of the 590 *l.* which was in their Hands, 90 *l.* for his Costs; and the Prosecutor consenting on those Terms, that the Decree should be reversed. Thereupon the present Information was brought against the Corporation, praying, amongst other Things, that they might answer Interest for this Money, for so long Time as they had had it in their Hands; and that now it may be taken out of their Hands, and put under the Management of other Trustees.

The Corporation put in their Answer, and thereby declared, That they were willing to account for the Money as the Court should direct.

Lord Chancellor said, That this Sum of 590 *l.* was given by different Persons, at different Times, to be lent out by the Corporation of *Stafford*, to the poor Inhabitants of that Town. Some Part of this Money is to be lent out to the Poor without Interest, other Parts of it to be lent out to the Poor at half Interest, and other Parts of it at the Rate of legal Interest. The first of these is a good Charity, in that it is a Means of Encouragement, to set the Poor at work; the second of these is good in Proportion. But how it is a Charity to lend Money to the Poor at full Interest, he could not find. It appears however, that formerly the Directions of these Charities had been complied with; and by the doing of this it was imagined, that there would be a Loss by lending this Money in this way, and that occasioned the calling of it in in 1714. By reason of the Money's being lent out in this way, there was a Loss of 140 *l.* Part of it. And considering this Money was to be lent out to the Poor in such small Sums as 5 *l.* and 10 *l.* at a Time, it is no Wonder, that there was such a Loss; and if the Whole had been lost in that way, the Corporation would not have been answerable for it. When this Deficiency was discovered, the Corporation began to consider how it was to be made up. They took Advice upon

What shall be said to be a good Charity, by reason of its being an Encouragement to the Poor to work.

Where Trustees shall not be answerable for a Loss, which happens in Money, that they are intrusted with.

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What shall
be a proper
Method to
take in or-
der to make
up a Defici-
ency in an
Estate.

Where a
Corporation
shall be
charg'd with
Interest for
a Sum of
Money,
which they
are made
Trustees of.

Where a
Defendant
shall be
charg'd with
Interest for
a Sum of
Money lon-
ger than to
the Time of
putting in
his Answer.

Where Inte-
rest shall be
added to the
principal
Sum.

When a
Corporation
is made a
Trustee of a
Sum of Mo-
ney, what
Allowances
they shall be
intitled to.

What shall
not be said
to be a good
Execution
of the Trust
of a Charity.

Where Tru-
stees of a
Charity shall
have an Al-
lowance in an

this Occasion ; and the Method that they were advised to take was, That they should lend out the Money upon Interest to any Persons, that would give them good Security for it ; and that they should let that Interest accumulate, till they had got up the whole Sum again as it was at first. His Lordship said, he did not know, that a better Method could be taken. This Method accordingly was taken ; and by this Means, in the Year 1725 the whole Sum was got up again. From that Time the Corporation have had the whole Sum of Money in their Hands ; and therefore it is pray'd, that from that Time they may account for it with Interest. With this Interest they ought to be chargeable ; and there is no Ground to stop the Interest at the Time of putting in their Answer, though they thereby declare, that they are willing to account for it as the Court shall direct. That Interest now must be added to the Principal, to increase the Sum, that is to be lent out to the poor Inhabitants. But then it becomes a Question proper to be considered, What Allowances the Corporation are intitled to have out of the 590 *l.* or rather out of the Interest of it ? One Allowance which they claim is, the 21 *l.* which they distributed to the Forty-two poor Inhabitants, at 10 *s.* *per* Head. It has been said, that this was done by Advice ; but his Lordship's Opinion was, That that Advice was far from being proper. The Intention of these Charities was, to assist the Industrious Poor, by lending them Money to go on with their Callings. But the giving them such small Sums as 10 *s.* apiece, was an Encouragement to make them idle. However, as this Money has been disposed of amongst the Poor, and as it was only a Mistake of Judgment in the Corporation, they must have an Allowance of it. But for the future, this Method of putting out this Money to Strangers, upon good Security, and distributing the Interest amongst the Poor, must not be continued. The next Allowance that is pray'd is, the 90 *l.* which the Corporation paid to *Walker*. This was a Sum of Money, that was paid to a Prosecutor of a Commission of Charitable

Charitable Uses, for his Costs expended in the Prosecution, upon his consenting, that the Decree of the Commissioners should be reversed. This Sum of Money must not be allowed the Corporation. This was a Commission that there was a Foundation for; it was to compel the Corporation to lend out this Money in small Sums to the Poor, according to the Directions of the Charities. The Commissioners decreed, that the Money should be lent out in that Manner. They order'd indeed, that the Corporation should pay the Costs of this Commission; and that perhaps was more than they could justify. Exceptions were taken to this Decree; but instead of arguing them, the Corporation and the Prosecutor came to an Agreement, that the Prosecutor should have this 90 *l.* for his Costs; and that the Decree should be reversed. This was certainly wrong, both in the Corporation and the Prosecutor. There is no Instance of Costs in these Cases, being directed to be paid out of the Charity Money, unless where the Bill is brought to establish a Charity. The remaining Question to be considered is, How much farther this Matter should be carried, and whether the Court should give Directions, that the Money should be taken out of the Hands of the Corporation, and placed in the Hands of other Trustees? Now his Lordship said, he did not think, that the Circumstances were strong enough for that. Nor was he at all inclined to take the Money into this Court, by directing it to be put into the Hands of a Receiver, or into the Hands of the Accountant General. However, the Circumstances are strong enough to direct, that the Corporation shall pay the Costs of this Suit. The Information was made necessary by what they did. The Disposal of the 90 *l.* was a gross Misbehaviour; and they have not lent any Part of the 590 *l.* to the Purposes for which the Charity was given, ever since the Year 1725. And so his Lordship was pleased to Decree accordingly.

How far Commissioners of Charitable Uses cannot give Costs.

Where Trustees of a Charity shall not be allowed a Sum of Money for Costs.

How far Costs shall not be paid out of a Charity Estate.

Where a Charity Estate shall not be taken out of the Hands of a Corporation, and placed in the Hands of new Trustees.

Where the Court will not appoint a Receiver of a Charity Estate.

Where the Court will not direct a Sum of Money, given to Charity, to be placed in the Hands of the Accountant General.

Where a Corporation

on, intrusted with a Charity shall pay the Costs of the Suit relating to it. What shall be said to be a gross Misbehaviour in the Trustees of a Charity.

May 16.

Ryal and Roberts.

THE Bill suggested, that *Morley* was indebted to the Plaintiff in 82 l. 6 s. That in order to secure Part of that Debt, he made an Assignment of certain Goods to the Plaintiff; and on the same Day, to secure the rest, made an Assignment of certain Debts to him. The Bill charged, That after the making of these Assignments, *Morley* became a Bankrupt, that the Assignees under the Commission possessed themselves of the Goods contained in the Assignment to the Plaintiff; and thereupon the Plaintiff brought his Bill against the Assignees under the Commission, praying, That they might discover what those Goods were, which they so possess'd themselves of; and that they might account for them to the Plaintiff. The Bill farther pray'd, That the Defendants would permit the Plaintiff to make Use of their Names in order to recover the Debts, that were assigned to him.

To so much of the Bill as pray'd, that the Defendants might account for the Goods contained in the Assignment, the Defendants demurred in Law, and shew'd for Cause, that this was a Matter relievable only at Law.

Lord Chancellor said, That his Opinion was, the Demurrer ought to be over-ruled. He said, if this Demurrer was allowed, it would be to create two Suits instead of one; whereas the Whole might properly be determined here. 'Tis suggested by the Bill, that *Morley* was indebted to the Plaintiff in 82 l. 6 s. That in order to secure Part of this Debt, he made an Assignment of certain Goods of his; and that in order to secure the rest, he made an Assignment of certain Debts; these Assignments were made on the same Day, and it was one and the same Transaction. After this *Morley* became a Bankrupt. These Assignments were made by way of Security; and the Consequence is, that

that if there be a Surplus, besides what will satisfy the Plaintiff, he must account for it to the Estate of the Bankrupt. 'Tis indeed true, that the Plaintiff has a Remedy at Law to obtain the Possession of Goods, by bringing an Action of Trover. But though that is so, yet as the Goods were only assigned by way of Security, and consequently there is a Matter of Account, the Plaintiff is proper in taking his Remedy in this Court. And wherever there is a Mortgage or a Security, the Party is at Liberty to take his Remedy here, if he thinks proper. The same is, where a Pledge is made of Goods. And his Lordship said, he was the rather inclined to over-rule the Demurrer in the present Case, because the Bill was brought for Part of a Matter, where the Remedy was only in this Court; and that was, that the Defendants would permit the Plaintiff to make Use of their Names, in order to get in the Debts that were assigned to him. And so his Lordship was pleased to order accordingly.

Where a Party has Liberty to take his Remedy in Equity, by reason that the Matter relates to an Account.

Where the Party may proceed in Equity for an Account of Goods, though he might at Law maintain an Action of Trover for them.

Wherever a Security is

In Question, the Party may proceed in Equity, if he thinks proper. Where the Party may take his Remedy in Equity, by reason that the Matter relates to a Pledge.

Lowthal and Tonkins.

May 16.

THE Bill set forth, That upon *Thomas Tonkins* being appointed Cashire, or Receiver to the Commissioners of *Hawkers and Pedlars*, the Defendant *Packinton Tonkins*, who was Brother to *Thomas*, applied to the Plaintiff to be Joint Security with him for his Brother, in the Sum of 6000 *l.* and that he promised to indemnify him upon that Account. The Bill charged, That *Thomas* absconded in the Year 1720; that on that Occasion an Extent was threaten'd to be taken out against the Plaintiff; and, that in order to prevent it, he paid down 3000 *l.* The Bill charged, That the Plaintiff afterwards paid several other considerable Sums on that Account; that thereupon, in order to reimburse himself the Monies, that he had so expended, he filed his Bill against the Defendant, and at the same Time

Where a Bill will not lie in Equity, to discover the Concealment of Goods, when the Concealment was to prevent their being taken in Execution.

Time proceeded at Law against him on that Account. That by doing this, he was obliged to make his Election which Court he would continue to proceed in; and that he made his Election to go on with his Proceedings at Law. That he recover'd at Law 4500 *l.* against the Defendant; and that, in order to levy this Money, he sued out an *Elegit* against him. That this Writ was delivered into the Hand of the Sheriff in 1734; but after the Delivery of it into the Sheriff's Hands, and before the Writ could be executed, that the Defendant secreted great Part of his Goods, in order to defraud the Plaintiff of the Benefit of his Execution. However, the Bill charged, That the Writ was afterwards executed; that under this Writ the Sheriff did take what Goods he could find, and seised a Moiety of the Defendant's Land. That this Writ was returned and filed, and that afterwards a *Liberate* was sued out; and thereupon this Bill was brought, in order to compel the Defendant to set forth, whether he did not make such Concealment of Part of the Goods, that has been mentioned; and that he might discover in whose Hands those Goods were placed. And farther, the Bill prayed, That the Defendant might set forth what Incumbrances there were upon the Land, that was seised under this *Elegit*.

To so much of the Bill, as pray'd that the Defendant might discover the Concealment of the Goods, which has been mentioned, the Defendant pleaded in Bar the Substance of the Matter, as set forth in the Bill; and insisted, that as the Plaintiff had executed his *Elegit*, and as the Return of that Writ was filed, the Plaintiff's Remedy was closed, and that he was not intitled to the Discovery which he sought after; and as to the remaining Part of the Bill, whereby the Plaintiff pray'd, that the Defendant might set forth what Incumbrances there were on this Estate, he demurred in Law.

Mr. Ponsford argued in Support of the Plea; and for Authority cited 3 Cr. 310.

Mr. *Brown* argued on the same side; and relied upon the Case in 1 *Lev.* 92.

Mr. *Yates* argued on the other side, and for Authority cited 1 *Vern.* 398.

Lord Chancellor said, That the Demurrer must be overruled; 'tis a Demurrer to that Part of the Bill, wherein a Tenant by *Elegit* seeks to discover Incumbrances upon the Estate, in order to bring an Ejectment under the *Liberate*. And such Person is equally intitled to come into this Court for such a Discovery, as any other Person whatsoever. A Tenant by *Elegit* is intitled to hold the Premises *quousque* he has satisfied his Debt; and an Ejectment is necessary for to get into the Possession. The Difficulty in the present Case arises upon the Plea; and 'tis really a new Point on which this Question arises. But his Lordship's Opinion was, That it would be of no Use to the Plaintiff to go on, as to this Part of the Case, which is covered by the Plea; and that the best way was to allow it. The Plaintiff was a Creditor of the Defendant, and had a Judgment against him; he takes an *Elegit* in 1734; the Writ is put into the Hands of the Sheriff; and indeed the Goods are bound from the Time that the Writ was delivered into his Hands. 'Tis said, that subsequent to the Delivery of the Writ to the Sheriff, the Defendant secreted Part of his Goods. However, the Plaintiff executed his Writ, and seized those Goods which he found remaining; he seized likewise one Moiety of the Land. The Plaintiff had thereupon the Benefit of a *Liberate*. The Day of the Return of the *Elegit* is expired, and the Return of that Writ is filed. It has been contended, that the Plaintiff is intitled to come into this Court for a Discovery of the Fraud in the Concealment of the Goods; and to shew that he is thus intitled, the Matter has been put two ways; that the Plaintiff will be benefited by this Discovery, either by going afterwards into a Court of Law, or else by having Relief in

Where a Tenant by *Elegit* may bring a Bill of Discovery.

Where a Tenant by *Elegit* must bring his Ejectment.

Where a Tenant by *Elegit* is not intitled to bring a Bill for a Discovery of Incumbrances.

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Where a Person suing out an *Elegit* is not intitled to come into Equity for a Discovery of the Goods of the Defendant, secreted after the Delivery of the Writ to the Sheriff.

In what Respects it may be said, that the Goods are bound, from the Delivery of the Writ to the Sheriff.

Where a new Writ of *Elegit* shall not be granted.

this Court. And his Lordship said, he did agree, that if by the having this Discovery the Plaintiff would be benefited in either of these Ways, he would be intitled to it. On the other hand, if he cannot be benefited in either of them, he will not be intitled to it. Now the Ground, on which the Plaintiff insists, that by having this Discovery he will be benefited in one or other of these ways, is, that by the Statute of Frauds the Goods are bound from the Time the Writ is delivered to the Sheriff; and from the Time, that the Writ is so delivered, it has been said, that the Plaintiff is intitled to *jus in re*, or *jus ad rem*. By having this Discovery, it has been said, that the Plaintiff will be intitled to apply to the Courts of Law for a new Writ of *Elegit*, and that the former one may be taken off the File. But his Lordship's Opinion was, That that could not be done. Before the Statute of Frauds and Perjuries, the Defendant's Goods were bound in his Hands from the *Teste* of the Writ of Execution. To avoid this, that Statute was made; whereby it is directed, that the Goods shall only be bound from the Delivery of the Writ to the Sheriff. But neither before this Statute, nor since, is the Property of the Goods alter'd, but continues in the Defendant till the Writ of Execution executed. But then it may be asked, What is the Meaning of those Words of the Statute, whereby it is said, That the Goods shall be bound from the Delivery of the Writ to the Sheriff? The Meaning is, That after the Writ is so delivered to the Sheriff, if the Defendant makes an Assignment of his Goods, unless in Market-overt, the Sheriff may take them in Execution. What could the Effect be of this Court's requiring a Discovery in the present Case? Could this Court give Relief? That would be for this Court to extend the Writ of *Elegit* farther than the Courts of Law will do it. It has been suggested by the Counsel for the Plaintiff, that if the present Bill was allowed, and the Defendant should make a Discovery of the Concealment, that the Plaintiff might afterwards go into a Court of Law, and have the Direction of that Court, that the present Writ of *Elegit* should

should be taken off the File, and a new Writ of *Elegit* granted. His Lordship said, That he did not know, that ever that had been done in a Case of this Nature. There has been indeed something tending to that done; as where a Man has not known in what County the Defendant's Lands have lain, and he executes his *Elegit* only in that County, where Part of the Lands has laid. His Lordship said, he did not know but afterwards, upon Discovery of the Mistake, the Courts of Law have allowed the Writ to be taken off the File, and a new one granted; and he believed the same had been done in this Court upon Statutes and Recognizances; but that could not be done in the present Case. And so his Lordship was pleased to order accordingly.

Neale and Willis.

May 17.

T *Thomas Brignett*, being possessed of a considerable personal Estate, on the 23d of *March* 1730 made his Will, and thereby gave to *John Neale* 600 *l.* to be laid out in the Names of his Executors, as Counsel should advise, in the Purchase of some Advowson or Advowsons, or other spiritual Preferment, for him; and until the same should be purchased, did order his Executors to place out the 600 *l.* at Interest in their Names, and continue the same until such Preferment could be had, and to pay *John Neale* such Interest for his Maintenance; and if there should be a Remainder after Payment of the Purchase, directed the same to be paid him; but if he should afterwards lend him any Money upon Bond or Note, the same should be deducted out of the 600 *l.* but without Interest. *Thomas Brignett* afterwards by his Will directed, That if his Brother-in-law, *Robert Neale*, should be living at the Testator's Decease, he thereby charged *Robert Neale's* three Sons, namely, the aforementioned *John Neale*, *Thomas* and *Robert*, to pay their Father yearly, during his Life, 20 *s.* out of each of their Legacies; and then directs, that if *John*, *Robert*

When a Legacy is given to be laid out in a particular Manner. Where the Representative of the Legatee shall be intitled to it, though the Legatee died before it was laid out in that Manner.

bert and *Thomas Neale* should die before their Legacies should become payable, that then the Legacy or Legacies of them or him so dying should not be paid, but fall into the *Residuum* of his personal Estate, and be applied as the same was directed. And afterwards the Testator, by a Codicil dated the 20th of *May 1732*, order'd, That if *John Neale* should die before the Legacy should become payable, according to the true Intent and Meaning of his Will, his Executors should pay to his Brother-in-law, *Robert Neale*, Father of *John*, yearly, during his Life, 20*s. per Ann.* for a Legacy, and made the Defendant Residuary Legatee. The Testator died in *May 1732*; *John Neale* afterwards died in *April* following, being at that Time about Twenty-five Years of Age. The 600*l.* given him by the Testator's Will was never paid him, nor was it ever laid out according to the Directions of that Will. A short Time before his Death he made his Will, and thereby gave to *Dinah Neale* all his personal Estate, and all his Interest in the Legacy left him by the Will of *Brignett*. *Dinah Neale* took out Administration with this Will annexed.

The present Bill was thereupon brought by *Dinah Neale* against the Representatives of the personal Estate of *Thomas Brignett*, and against several others, praying, That she might have the Benefit of the 600*l.* given to *John Neale*.

The *Attorney General* argued on the Part of the Plaintiff, and for Authority cited the Case of *Hawkins and Chapel*, determined by the present *Chancellor* in *November 1739*.

Mr. Chute on the same side cited 1 *Vern.* 255. the Case of *Sidney and Van*, *July 6, 1721.* and that of *Larbor and Abbingdon*, at the Rolls.

Mr. Brown argued on the other side, and for Authority cited the Case of *Carter and Carter*, the 13th of this Month, determined in that Court.

Lord Chancellor said, That the single Question for his Consideration was, Whether the 600 l. given to *John Neale* by the Will of *Brignett* was, on the Circumstances of the present Case, transmissible to the Administratrix, with the Will annexed of *John Neale*? And his Lordship was of Opinion, that it was. The Testator had three Nephews, *John*, *Thomas* and *Robert*. It should seem, by the Frame of the Will, that *John* was the Eldest of these Nephews. He makes a Provision in different Manners; with regard to *John* he gives the 600 l. in Question; and then his Lordship stated out of the Will the Manner by which it was given; with regard to *Robert* and *Thomas*, he gives them 800 l. apiece. He then takes Notice of the Father of these Children, and directs, that they shall pay him 20 s. per Cent. out of their Legacies. Then comes the Clause, on which the Difficulty of the present Question chiefly arises; the Words of it are to this Effect. That if the said *John*, *Robert* or *Thomas*, or any of them, should die before their Legacies should become payable; that then the Legacy or Legacies of them or him so dying, should not be paid, but fall into the general *Residuum* of his personal Estate. It has been insisted, that this Bequest over prevents the Plaintiff from having any Benefit of this Legacy. To determine that, 'tis necessary to consider whether *John* died before the Legacy became payable; for the Clause, by which the Devise over is made, is not that this Legacy shall sink into the *Residuum*, if he dies before it is paid, but if he dies before it is payable. Now in order to determine this, it is to be observed, that the 600 l. is given to *John* himself. 'Tis indeed to be laid out by the Persons mentioned in the Will, and that was the Intention of it; and if *John* had come to have demanded the Money of the Executors, they might possibly have insisted, that it ought to be laid out in the Manner mentioned by the Will. But then on the other hand, 'tis payable even at the Death of the Testator; and therefore if *John* had instantly, upon the Testator's Death, found out a Purchase for this Money to be laid out in, he

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might

Where a Legacy shall be said to be transmissible.

Where a Person shall be said to die before a Legacy becomes payable.

Construction of such Clause, which makes a Devise over.

might have demanded it. This shews it was payable immediately. By this Will there is no Suspension of the Interest arising from the Legacy till the Advowson can be purchased; but on the contrary, Interest is to be paid of the Legacy in the mean Time, and that to *John* himself. To shew that this Legacy was not payable so soon, it has been urged, that by the Course of a Court of Equity Legacies are not payable till a Year after the Testator's Death. And true indeed it is, that in general Cases this is so; and therefore, on a Bill brought by a Legatee against an Executor, Interest shall not be given for the Legacy till a Year after the Testator's Death. But by the present Will the Interest of this Legacy is expressly given from the Death of the Testator. And as to the Clause, which has been so much relied on, concerning the Devise over, the Words of it may well be answered, by construing it to mean no more, than that the Legacies given to the Nephews should sink into the Estate in case any of them had happened to have died in the Life-time of the Testator. And so his Lordship was pleased to decree accordingly.

May 20.

Kendal and Micfeild.

SIR *Henry Hern* had a Rent-charge of 166 *l. per Annum* granted to him and his Assigns for three Lives. He and his Lady joined in a Mortgage of this Rent-charge to *Joseph Kendal*. In the Premises of this Deed of Mortgage, the Rent was granted to him, his Executors, Administrators and Assigns, to have and to hold to him, his Heirs and Assigns during the three Lives, for which this Rent was originally granted; upon this special Trust, that he, his Executors, Administrators and Assigns, do and shall enjoy 100 *l. per Annum* out of it to their own proper Use, till the Sum contained in the Mortgage was satisfied, if the three Lives should last so long. *Kendal* made his Will, and thereby appointed the Plaintiff his Executor; but to this Will there were no subscribing Witnesses.

The present Bill was brought by the Plaintiff against the Heir at Law of *Kendal*, and against several others, in order to have the Benefit of so much of the Rent-charge as *Kendal* the Mortgagee was intituled to.

When this Cause came on to be heard before his Honour, he thought it was a Point that deserved to be something considered of; accordingly ordered it to stand over for Judgment; and now he was pleased to deliver his Opinion in it. He said, there were two Questions for his Consideration; the one, What Sort of a legal Estate the Mortgagee had in this Rent-charge? namely, Whether it was such an Estate as would go to his Heirs for the three Lives, that have been mentioned? or, Whether it was such an Estate as, during those three Lives, would go to his Executors? And supposing, for Argument sake, the legal Estate would go to his Heirs, the next Question is, Whether the Trust of it does not belong to his Executors? What makes this a very particular Case is, that this is an Estate *pur autre vie*. And the first Point of the Case is so new, that was it not for the second, he should have thought it proper to have had the Opinion of a Court of Law upon it. For though the Rules are fully established how far the *Habendum* of a Deed shall vary and explain the Premises of it; yet when one comes to apply the present Case to those Rules, there arises a good deal of Difficulty. And his Honour said, he could not find a single Authority which would come up to the first Point of the present Case. The general Rules are, That the Office of the *Habendum* is, to explain, limit and declare the *Quantum* of the Estate which is to pass by the Deed. It has never been disputed but that it will carry the Limitation of the Estate farther than the Premises of the Deed did. If a Man gives an Estate to *A.* for Life, *Habendum* to him and his Heirs, a Fee-simple clearly passes. On the other hand it is clear, that the *Habendum* never abridges the Estate granted by the Premises of the Deed; it may indeed vary and alter it.

Where the legal Estate in a Mortgage shall go to an Heir, where to an Executor.

Where the Trust of a Mortgage shall go to an Heir, where to an Executor.

How far the *Habendum* of a Deed shall explain the Premises of it.

As

What words
in a Deed
give a Fee-
simple, what
only a Fee-
tail, with a
Remainder
in Fee.

What grants
made by a
Tenant *pur*
autre vie,
will be good.

As if a Man grants an Estate to *A.* and *B.* to have and to hold to *A.* for Life, the Remainder to *B.* the Premises of the Deed in that Case will be controlled by the *Habendum*. So if an Estate is granted to a Man, and to the Heirs of his Body, *Habendum* to him and his Heirs; this is a Fee-simple. It has been said in some Books, that this is only an Estate-tail, with a Remainder in Fee; but it is difficult to maintain that Opinion; and his Honour thought that it was not Law. So far the Rules relating to *Habendums* are plain and clear; but the particular Nature of the present Case is such, that a Grant of this Kind to a Man and his Executors, is the same as a Grant to a Man and his Heirs; for in both these Cases the Heirs and Executors do not take as Representatives to the Party, but as special Occupants; and therefore it has been held, that if a Grant of an Estate is made to a Man and his Heirs for three Lives, he may grant it to another, and his Executors during those Lives. So on the other hand, if such Estate is granted to a Man and his Executors for three Lives, he may grant it to another and his Heirs during those Lives. And as this is so, that it is consider'd as the same Kind of Estate, whether a Grant of that Sort is made to a Man and his Heirs, or whether it is made to a Man and his Executors; it follows from thence, that when one of these Limitations is in the Premises of the Deed, and the other of these Limitations is in the *Habendum*, the *Habendum* shall take Place. For Instance; if in the Premises of the Deed the Grant of the Estate *pur autre vie* is to *A.* and his Executors during the Life of *B.* *Habendum* to *A.* and his Heirs during that Life; the Heirs in that Case shall have the Benefit of the Estate. On the other hand, if the Grant of such Estate is to *A.* and his Heirs during the Life in Being, *Habendum* to *A.* and his Executors during that Life, the Executors shall have the Benefit of it; and the Reason for that is, That the *Habendum* in that Case does not attempt to give a less or a larger Estate than was contained in the Premises, but is merely Explanatory. But then a Difficulty arises, in the present Case, from this being the Case of a Rent; and it

is clear, that before the Statute of Frauds and Perjuries no Grant of a Rent *pur autre vie* could be good any longer than the Party himself lived to whom the Grant was made. And though that Grant was made to a Man and his Heirs during the Life of another, or to a Man and his Executors during such Life, neither the Heir nor Executor could have any Benefit from such Grant. This appears from 3 Cro. 901. and several other Authorities; and the Reason given for this was, That a Rent was such a Thing as did not lie in Occupancy; so that it was certain, that there could not be a general Occupancy of it; nor would the Common Law admit, in that Case, even of a special Occupancy. But then the Question is, Whether the Statute of Frauds and Perjuries has not alter'd the Law in this Respect? and whether a Rent is not within the Relief of that Act of Parliament, as well as any other Sort of Inheritance? And his Honour was of Opinion, that it was. The Statute intended to make a General Alteration with regard to all Sorts of Estates, that were granted *pur autre vie*; and a Rent-charge is as much within the Intention of that Act of Parliament, as any other Hereditament. This Difficulty then concerning this Case being, that of a Rent, may quite be laid aside; and then the Matter concerning the legal Estate depends upon that which he had before mentioned, namely, Whether the *Habendum* in this Case ought not to take Place? And he was of Opinion, that it ought, for the Reason that he had before given; and consequently, that the legal Estate in this Rent belong'd to the Heir at Law. But then the next Question is, Whether, within the Meaning of the Trust of this Deed, the Executor *Kendal* is not intitled to the Benefit of that? And his Honour was of Opinion, that he was. It is expressly declared by the Deed, that the Mortgage was made upon the special Trust, that the Mortgagee, his Executors, Administrators and Assigns, should enjoy the Benefit of 100*l.* *per Annum*, Part of the Rent-charge, to their own Use, till the Mortgage was satisfied, if the three Lives continued so long. The only Thing, that makes the least Difficulty in

Construction of the Limitation of a Rent-charge granted *pur autre vie*.

How far even a special Occupancy can not be of a Rent.

How far a Rent-charge is within the Meaning of 29 Car. 2. sect. 3.

Where a
Man and his
Heirs shall
be Trustees
for himself
and his Ex-
ecutors.

this Part of the Case, is, that it is pretty hard to conceive how a Man and his Heirs should be Trustees for a Man and his Executors; but this is the Case of every Mortgage, that is made in Fee. And so his Honour was pleased to decree accordingly.

May 23.

Woodgate and Fuller.

MR. *Weldon* moved, that the Defendant might have Liberty to amend his Answer, by striking out the following Words, viz. “ And this Defendant doth not know, that they had any other Issue between them begotten; and this Defendant believes the said *John Stephens* died a Bachelor in his Father’s Life-time; and that the said *Thomas Stephens* afterwards died without leaving any Issue by *Elizabeth*; but when in particular he or his Son died, this Defendant cannot set forth.” And that the following Words might be inserted, viz. “ But this Defendant doth not believe, that *John Stephens* was the only Child of *Thomas Stephens* by *Elizabeth* his Wife; for this Defendant hath been informed, and doth believe, and doubts not but to prove, if Occasion be, that *Thomas Stephens* had Issue by *Elizabeth* his Wife, not only *John* his Son (who, as this Defendant believes, died without Issue, and in his Father’s Life-time) but also four Daughters, *Elizabeth*, *Sarah*, *Mary* and *Anne*; and that *Anne* intermarried with *Thomas Walker*, and is now living; and that *Elizabeth*, *Sarah* and *Mary*, are all since dead; but that *Elizabeth*, who intermarried with one *Abraham Spencer*, and *Sarah*, who intermarried with one *Richard Shaw*, have severally left Issue by their respective Husbands; and that some of them (to wit) *William*, *Sarah* and *Abraham*, Children of *Elizabeth*, and *Elizabeth*, *Richard* and *William*, Children of *Sarah*, are now living; but when in particular *Thomas Stephens* or his Son died, this Defendant cannot set forth.”

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To

To shew that this was a mere Mistake in the Answer, Mr. *Weldon* produced the Affidavit of the Defendant; and to shew that *Anne* was living he produced the Affidavit of her herself.

Mr. *Smith* argued on the other side, and to shew that this Amendment ought not to be allowed, he cited 2 *Vern.* 434, 435. and the Case of *Goodwin* and *Worthly*, Mich. 1729. in the Court of Exchequer.

Lord Chancellor said, That his Opinion was, the Amendment ought to be allowed. He said he knew no certain Rules concerning the Amendment of Answers, and they are in the Discretion of the Court. Amendments of this Sort have not been confined merely to Mistakes in the Ingrossment of the Answer, where that has differed from the original Draught. But Answers have been allowed to be amended, where there have been Mistakes in it in Matter of Fact. Nay, his Lordship said, he has known this carried so far, that an Answer has been allowed to be amended even after a Defendant has had a Prosecution of Perjury commenced against him for what he has sworn in his Answer; but that has been only where the Circumstances have been extremely strong to shew that it could have been only a mere Mistake. One of the Cases in *Vern.* which has been cited, does not come up to the present one; for there was only the Affidavit of the Defendant himself to support the Amendment. But here is the Affidavit of *Anne*, who is the Sister that is living. With regard to the Case cited out of the Court of Exchequer, his Lordship said, That he should have been of a different Opinion. That was an Amendment that was pray'd in that Part of the Answer which related to the Time of Payment of a *Modus*. 'Tis said, that that Amendment was refused, and that the Reason given for it was, That there was nothing to amend by. But that is not the Rule even with regard to Amendments in Courts of Law. That indeed is the Rule, where

There are no certain Rules about Amendments of Answers; for those Amendments are in the Discretion of the Court.

An Answer may be amended even after a Prosecution for Perjury commenced against the Defendant, for what he has sworn in his Answer, where it plainly appears to be a mere Mistake.

Where an Answer not allowed to be amended barely upon the Affidavit of the Defendant.

the Matter is of Record, which is sought to be amended; but it is not the Rule when the Matter is in Paper. In the present Case the Nature of the Fact speaks it, that as the Answer now stands, the Clause inserted in it could not have been inserted to serve any Interest of the Defendant; it was not a Fact asserted by the Answer, but admitted by it. However, his Lordship said, That if there had been only the Affidavit of the Defendant, he should not have allowed of the Amendment; but as there was the Affidavit of the other Person, he thought the Amendment was extremely reasonable. And so his Lordship was pleased to order accordingly.

June 3.

Diggs and Coolebrook.

IN 1734 the present Bill was brought against the Defendant, in order to have an Account of certain Dealings and Transactions between the Plaintiff and him, and to be relieved against certain Deeds, on Payment of what was *bonâ fide* due.

To this Bill the Defendant answer'd in Part, and to the rest of it pleaded several Accounts in Bar. This occasion'd the Plaintiff's amending his Bill, and the Defendant put in an Answer and Plea of the like Kind. The Plaintiff amended his Bill a fifth Time, and a like Plea and Answer were put in to it.

On the 15th of *December* last the Plea to this last amended Bill was set down to be argued; and the Order which was made at that Time was, That the Plea should stand for an Answer, with Liberty to except to such Part of it, as related to the Times when the Accounts were pleaded to have been stated. A short Time before the Beginning of *Hillary* Term following this Order was drawn up, and by the Course of the Court the Plaintiff, in Strictness, ought to have filed his Exceptions, which the Order of *December* allowed

allowed him, within eight Days after the Beginning of *Hil-*
lary Term.

On the 16th of *May* the Plaintiff preferred a Petition to the *Master of the Rolls*, setting forth the Order which was made on the 15th of *December* last; and that he had not been able as yet to file Exceptions to the Plea, in such Parts of it as the Plaintiff was allowed to except to by the Order of *December*, which has been mentioned; and thereupon the Petition prayed, That Exceptions might be received *nunc pro tunc*, as of the Time when they ought to have been filed. On this Petition his Honour was pleased to make an Order on that Day, that the Plaintiff should have this Liberty.

The *Attorney General* moved now, that this Order might be discharged, submitting it, that, considering how long the Plaintiff had laid by since the Order of *December* was made, and considering the other Circumstances, that the other Case is attended with, he ought not to have had this Liberty given him of having these Exceptions received.

Lord Chancellor said, That his Opinion was, the Order, which was made at the *Rolls*, was a very right one. He said it was very true, that by the strict Rule of Court the Plaintiff should have filed his Exceptions within eight Days after the Beginning of *Hilary* Term. However, that Rule is not so strictly to be adhered to, but that, upon reasonable Circumstances, the Court will, after the Time elapsed, give Liberty, that Exceptions shall be received *nunc pro tunc*; and in the present Case it is extremely reasonable, that the Liberty which was asked should be granted. The Bill is a long Bill, several times amended; the Pleas have been long, and the Answers have been so likewise. 'Twas but a Week before *Christmas* Holy-days, that the Order was made, that the Plea should stand for an Answer, with Liberty to except, as has been mentioned, and that Order not drawn up till a few Days before *Hilary* Term. On the 16th of

The Time
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Exceptions.

After the or-
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May the Petition was preferred, and that was three Days before the End of *Easter Term*; and when the Party does come before a second Term expires, the giving Liberty to receive Exceptions is seldom refused; and in the present Case there was the greater Reason for allowing this Liberty, because by the Order of *December* the Plaintiff was confined to except to certain particular Matters. And so his Lordship was pleased to order accordingly.

June 9.

Gower and Grosvenor.

SIR Richard Grosvenor made his Will, and thereby devised his Real Estate to *Sir Tho. Grosvenor* for Life, without Impeachment of Waste; the Remainder to Trustees, to preserve contingent Remainders, the Remainder to his first and other Sons in Tail Male; he gave him a Power to make a Jointure, and a Provision for Daughters Portions. In Default of Issue of *Sir Thomas*, the Testator devised this Estate to his Brother *Sir Robert Grosvenor*, in the same Manner as he had devised it to *Sir Thomas*; then came a Clause to the following Effect. “*Item, My Will*” is, that my Plate, Jewels, Library of Books, and Furniture of my Mansion-houses in ——— and my Dwelling-house in *Westminster*, shall go as Heir-looms, as far as they can by Law, to the Heirs Male of my Family successively, as my real Estate hereby settled.” And as to the Residue of his personal Estate not hereby disposed of, he bequeathed the same to *Sir Thomas*, making him his Executor. *Sir Richard* died, and after his Death *Sir Thomas* made his Will, whereby he gave a Legacy of 2000*l.* to *Catharine Lucy Gower*, who was his Sister’s Daughter, payable at her Age of Twenty-one, and gave her another Legacy, likewise payable at the same Time. *Sir Thomas* died, having never had any Son, and made *Sir Robert Grosvenor* his Executor, and thereupon the present Bill was brought by *Catharine Lucy Gower*, by her next Friend, during her Infancy, and before her Legacies became

became payable, against Sir Robert Grosvenor, in order to have her Legacies secured to her.

And now the principal Question for the Consideration of the Court was, Whether the Plate and other Things, directed by the Will of Sir Richard to go as Heir-looms to the Heirs Male of his Family, as far as they could by Law, belong to Sir Robert Grosvenor on the Death of Sir Thomas, Sir Thomas having never had a Son; or whether they were to be considered as Part of the personal Estate of Sir Thomas, so that his Executors were intitled to them, and that they should go to the Representatives of his personal Estate.

Mr. Noel argued on the Part of the Plaintiff; and to shew that Sir Robert Grosvenor would not be intitled to any Benefit of this personal Estate, he cited the Case of the *Attorney General and Hall*, July 5. 1731. That of *Clare and Clare*, determined by Lord Talbot the 8th of May, 1734. *Salk.* 229. and that of *Gainsbury and Fox*, lately in the House of Lords.

Mr. Murray argued on the same Side, and for Authority cited the Case of *Bacchous and Bellingham* in *Pollexfen* 33. and that of *Burgefs and Burgefs* in the same Book 40. *Swinburn*, cap. 11. *Goodright and Wright*, lately in the King's Bench, and *Brown and Williams*, the 8th of this King, in that Court.

Mr. Parrot on the same Side cited the Case of *Hart and Hart* in 1 *Chan. Rep.* 260. in the *Octavo* Edition.

The *Attorney General* argued on the other Side, and for Authority cited the Case of *Fourth and Chapman*, determined in the Time of Lord Macclesfield, *Higgins and Derby* in *Salk.* 156. and reported in 2 *Vern.* 600. by the Name of *Higgins and Dowler*; *Standly and Lee*, determined at the Rolls the 5th of March 1732. The Certificate of
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the Judges of the King's Bench, in the Case of *Saberton* and *Saberton*, made upon a Case sent to them by Lord *Talbot*; *Sandys* and *Dixwell*, lately determined by his Lordship; *Thomson* and *Marriott*, decreed at the *Rolls* the 6th of *December* 1732. *Don* and *Marryfeild* the 27th of *October* 1730. *Floyd* and *Cary*, *Massing-Bourn* and *Asb*, *Stevens* and *Stevens*, *Hopkins* and *Hopkins*, *Boswell* and Lord *Glenorchy*, first before Lord *King*, and afterwards before Lord *Talbot*, and that of *Papillion* and *Boyce*, determined in the Time of Lord *King*.

Mr. *Bootle* on the same Side cited *Brook*, Title *Devise*, 13. *Owen* 33. 1 *Cro.* 343. 1 *Chan. Ca.* 129. *Pimbury* and *Elkin*, and 2 *Vern.* 245, 331.

And Mr. ----- on the same Side cited the Case of *Thomas* and *Terry*, determined by Lord *Harcourt*.

Constructi-
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Clauses in
Wills,
whereby
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Chattels are
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Lord Chancellor said, That the Plaintiff's Demand is a very plain one; and there can be no Doubt neither but the Bill is a proper one, it being to have two Legacies secured to her. The Question in the present Case is concerning the Fund, out of which these Legacies are prayed to be satisfied. And for the settling of this Question, the most considerable Point in the present Case is, Whether the Plate, Jewels, Library and Furniture of Sir *Richard Grosvenor* are (on the Event that has happen'd) Part of the personal Estate of Sir *Thomas*, and to go to his Representatives? And this indeed is a very considerable Question, and not only in respect of the Limitations of personal Chattels, but in respect of the Frequency of these Clauses in Wills, Marriage Articles and Settlements. The Expression in the present Will is, That these personal Chattels shall go as *Heir-looms*; which Expression is not to be understood in the strict Sense of that Word, but only signifies in general, that they are to go with the rest of the Family Estate; and where Men have settled a considerable real Estate, it is frequent to find some Clause in the Instrument,
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of

of the same Kind as the present one. And if a very strict Construction was to be made on these Sort of Clauses, referring to Limitations of the real Estate, it would tend very much to defeat the Intention of the Party. Clauses of this Nature are intended as Monuments of great Families, to support the Honour and Dignity of them; but be it as it will, the Rules of Law and Equity must take Place; and the Testator's Intention must not prevail any farther than it is consistent with those Rules. But surely nothing is more plain than the Intention of Sir *Richard* in the present Case; and Sir *Thomas* himself would have been surprised if he had been told, that the personal Chattels in Question were Part of his personal Estate, and to go to his Representatives. His Lordship said, he would consider the Clause in Question in two Lights. *First*, Without these Words in it, *as far as the same can be by Law*. And, *secondly*, As this Clause is in it. And so much will arise from considering this Question in the second of these Lights, that it would make it unnecessary for him to determine it on the first. However, his Lordship said, he would consider it likewise in the first of these Lights, and would mention his present Apprehensions about it. Sir *Richard* having an Intention to settle his real Estate in his Family, and that the personal Chattels in Question should go in the same way, makes a Devise of his real Estate to Sir *Thomas* for Life, without Impeachment of Waste, the Remainder to Trustees, to preserve contingent Remainders, the Remainder to his first and other Sons in Tail Male. There is the usual Power given him of making a Jointure, and Provisions for Daughters. In Default of Issue of Sir *Thomas*, the Estate is given to his Brother *Robert*, in the same Manner as it was limited to *Thomas*; and then comes the Clause on which the present Question arises, which is in these Words. “ *Item*, My Will is, That my Plate, Jewels, Library of Books and Furniture of my Mansion-house in
“ ----- and my Dwelling-house in *Westminster*, shall
“ go as Heir-looms, as much as they can by Law, to the
“ Heirs Male of my Family successively, as my real Estate
Q “ hereby

What sort of
Constructi-
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in Wills are
to have,
whereby a
personal E-
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How far
Limitations
in a Will
must receive
such a Con-
struction, as
to be good
or bad, ac-
cording as
Matters
stood at the
Death of the
Testator.

How far
personal E-
state may be
limited by
Will.

“ hereby settled.” This Clause referring to the former, where-
by the real Estate is settled, it must be construed the same
as if so much of the former Clause, as could possibly relate to
the Limitation of the personal Estate, had been repeated. And
therefore, without inserting over again the Clause, without
Impeachment of Waste, or that of Trustees to preserve con-
tingent Remainders, or the Clause for making Provision for
Daughters, which could not possibly be applied to the Limi-
tations of the personal Chattels; ’tis the same as if the rest of
the Clause had been inserted over again, and these personal
Chattels had been directly bequeathed to Sir *Thomas* for
Life, Remainder to his first and other Sons in Tail Male,
the Remainder to *Robert* in like Manner. It has been in-
sisted, on the Part of the Plaintiff, That, though the Will
had been penned in that Manner, the Limitation to *Ro-
bert* would have been void, notwithstanding the Fact was,
that Sir *Thomas* had never a Son. It has been contended,
that all Limitations of Estates by Will must receive such
Construction, that they must be good or bad, according as
Matters stood at the Death of the Testator; and that no sub-
sequent Event can vary the Matter. It has been contended,
that a Remainder of personal Chattels, after giving them to
one and the Heirs of his Body, is absolutely void; such
Person who would have been intitled to an Estate-tail, if
it had been a real Estate, being intitled to the absolute Pro-
perty in those Chattels, to go to him and his personal
Representatives. And ’tis indeed true, that this is a Que-
stion, wherein there has been a good deal of Variety of
Opinions. The first Case upon this Subject was *Matthew
Manning’s* Case, in the 8th Report; and after that came *Lam-
pet’s* Case, in the 10th. But since those Cases, the Courts
both of Law and Equity have gone a great deal farther
in allowing Limitations of personal Estate, than those Ca-
ses did. However, still it is settled, that if there is a Li-
mitation over of personal Estate, after that which would
have been a plain vested Estate-tail, if it had been a real
Estate, he that would have been intitled to have been Te-
nant in Tail, if it had been in case of a real Estate, shall

be

be intitled to the absolute Property in the personal Estate; so that it shall go to his Representatives, and the Limitation over will be absolutely void. But without giving a conclusive Opinion upon this Point, as his Lordship at first declared he would not, he said, That in the Reason of the Thing there seem'd to him to be a great Difference between such Sorts of Limitations, that are vested ones, and Limitations of this Sort, that are contingent. In those Cases where they are vested, the Party trusts to no Event, and nothing is put as doubtful. As if a personal Estate is bequeathed to *A.* for Life, the Remainder to *B.* and the Heirs Male of his Body, and *B.* is a Person in *Esse*, the Remainder to *C.* the whole Remainder in that Case is vested in *B.*; and *C.* by no Possibility can ever take any Part of this Estate. But where the Limitation is in its Creation a contingent one, the Party trusts to the falling out of the Contingency; and his Lordship's present Opinion was, that according to the Event of that Contingency the Limitation over would be good or bad; namely, if that, which would have been a contingent Remainder in Tail, had it been in case of a real Estate, becomes a vested one during the Lives of any of the Tenants for Life, or if a posthumous Child would have had the Benefit of the Remainder, had it been within the Statute of King *William*, then the Remainder over would be bad; but if no such Contingency happens, the Remainder over will be good. And there are other Instances, where a subsequent Event determines whether a contingent Interest shall be good or bad. 'Tis the ordinary Case, where the Estate is limited to *A.* for Life, the Remainder to his first and other Sons in Tail, without an intermediate Remainder to Trustees to preserve the contingent Interest to the Son, if *A.* happens to have a Son born during his Life, the Remainder to the Son is good; but if the Son was not born till after the Death of *A.* by the Common Law the contingent Remainder became void. The same is it, where a Devise is made to *A.* for Life, the Remainder to the right Heirs of *B.*; if *B.* dies during the Life of *A.* the Remainder

Constructi-
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Constructi-
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terests.

How far a
subsequent
Event shall
determine
whether a
Limitation
shall be good
or bad.

How far
Words of
Reference
must be con-
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same Man-
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Words re-
ferred to
were re-
peated.

What words
shall be con-
strued to
have a dou-
ble Contingency.

der is good ; but if he does not die till after *A.* the Remainder would be void. This shews, that where contingent Interests are created by a Will, the Will must be construed by taking in those Contingencies ; and the Validity of the contingent Interest will depend upon the Event of the Contingency. Consider then what is the proper Construction of such Sort of Limitations, as is made in the present Case. His Lordship said, he had before observed, that, as there were Words of Reference in this Clause, the Clause was to be construed the same as if the Words referred to were repeated, as far as those Words can be any ways applicable to the Matter in Question. Now if those Words had been repeated, these personal Chattels would have been bequeathed to Sir *Thomas* for Life, the Remainder to his first and other Sons in Tail Male ; and in Default of such Issue Male, the Remainder to *Robert*. Now what is the plain Construction of these Words, *in Default of such Issue Male* ? It evidently takes in two Contingencies ; one, that of Sir *Thomas*'s never having any Issue Male ; the other, such Issue Male dying without Issue. And upon one of these Contingencies happening, namely, Sir *Thomas*'s never having a Son, the Remainder over to *Robert* becomes good. Upon the other Contingency indeed, the Remainder over cannot be good. This is the Meaning of that which is said by Lord *Comper* in the Case of *Higgins* and *Derby*, reported in *Salk.* namely, *Where the Limitations of the Sons ever took Effect, and the Estate vested, the Remainder and Limitation to the Daughters becomes void. But if there never was a Son, as it happened in that Case, the Remainder is good ; for the Limitation must be construed, if there be a Son, then to him ; if no Son, but a Daughter, then to her.* And this way of construing contingent Interests to be good or not, according to the Event of them, is something like the way of Reasoning, that the Court went upon in the Case of *Loddington* and *Kime*, reported likewise in *Salk.* The Counsel for the Plaintiff have taken a great deal of Pains for their Client, and have gone a great way back into antient Authorities, to shew, that *Robert* can take no Benefit

Benefit of the present Limitation of these personal Chattels. The two oldest Cases in this Court, that they mentioned, have been, that of *Baccus* and *Bellingham*, and that of *Burgefs* and *Burgefs*, reported in *Pollexfen*. They were Cases determined by Lord *Nottingham*, and are taken Notice of by himself in his Argument in the Duke of *Norfolk's* Case; and therefore his Lordship said, he would rather choose to observe upon them, as they are cited in the Argument in that Case. Lord *Nottingham's* Reason for the Limitation over not being good, is, that it looks like a Perpetuity. But his Lordship said, That he did not think, because a Limitation over looks like a Perpetuity, that that was a sufficient Reason to destroy a Limitation in the Will; and it seemed to him, according to an Expression in Lord *Vaughan*, That it was a very spungy Reason. In the other of those Cases, the Reason for the like Opinion is, That the Limitation over has a Prospect of a Perpetuity. Lord *Nottingham* certainly was a great Master of Words. This is only a *Variation* in Expression, of the same Import with the former; and this Reason neither does not seem to be satisfactory. Lord *Nottingham* did not consider the double Contingency that there is in these Cases. In the one of them indeed there is a Prospect of a Perpetuity; but in the other there is not. And this Observation of the double Contingency was the Foundation of the Case of *Vachell* and *Vachell*, cited by Mr. *Boote* in 1 *Chan. Ca.* 129. The Case of *Stanley* and *Lee*, his Lordship said, was an express Authority for the Opinion that he was at present of. It is said, that Case was shaken by the Case of *Clare* and *Clare*; but it seems to be supported again by the Case of *Saberton* and *Saberton*. It has been indeed said by the Counsel for the Plaintiff, that the Resolution of the Judges in that Case of *Saberton* and *Saberton* might have been maintained, notwithstanding they did not determine that Point, that is now in Question; and, in order to shew this, it has been said, that the Words in that Case were, "That in case "neither of the first Takers for Life shall leave any law-
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What shall
be a good
Limitation,
though it
looks like a
Perpetuity.

“ful Issue, then the Limitation was given over.” And from thence an Argument has been drawn, that

Where a Clause in a Will shall be said to be only Executory.

Where the Intention of a Will is, that a Court should settle a Conveyance.

Construction of such Clauses in a Will, directing a personal Estate to go with the real, as far as it can by Law.

And true indeed it is, that an Observation of that Sort was made in the Case of *Forth and Chapman*, in the Time of Lord *Macclesfield*. But his Lordship did not think, that it could be the Foundation of the Judges Opinion in the Case of *Saberton and Saberton*; and therefore that that Case was an Authority in Point. However, his Lordship said, that he should not finally determine this Part of the Case, by reason that there were these Words in the Will, *as much as they can by Law*; which Words evidently shew, that there was a future Act to be done in the present Case; and that the Court was to direct a Limitation of these Chattels to be made, as far as it could be by Law. So that this Clause was only to be considered as Executory and Directory to that which the Court was to do; and consequently a greater Latitude is to be allowed, as that is the Case, than would be if no Conveyance was to be directed by the Court at all. As the Party has declared this by his Will, that he only intended to do what he could do by Law, there is no Colour for the Objection, which was made in the Case of *Baccus and Bellingham*, and in that of *Burgefs and Burgefs*, that what the Party aimed at was a Perpetuity. The Party declares in the present Case, that he aims at doing nothing but what the Law allows of, and therefore that Objection will be out of the Case; and tho' the Party only says *as much as they can by Law*, yet that is the same Thing as if he had said *by Law or Equity*, and that gives this Court a Jurisdiction to direct a Conveyance to be made; and as the Party has declared, that he designs these personal Chattels should go with his real Estate as much as they can by Law, it will be proper to consider how far this can be by Law; and thus much is extremely plain; he might have limited them to Sir *Thomas* for Life, the Remainder to his first Son, and the Heirs Male of his Body; and if such Son

dies

dies before the Age of Twenty-one, and without Issue, the Remainder over to the second Son; he might have made the like Sort of Limitations over to all the other Sons, and in Default of such Issue, the Remainder over; and in Case no such Son had lived to have attained the Age of Twenty-one, the Remainder over would have been clearly good. This is the common and known Way of Conveyancing; and in such Sort of Cases the Court must take Notice of it as Part of the Law; and in order to prove more expressly, that such a Limitation over would be good upon the Contingency of there being no Son that attained his Age of Twenty-one, the Case of *Stephens* and *Stephens*, determined by the Certificate of the Judges of the Court of King's Bench, when his Lordship sat as Chief Justice there, is an express Authority; and that was founded upon a former Case of *Taylor* and *Biddal* in 2 *Mod.* and to the like Purpose was that of *Massingbourn* and *Asb.* This shews how far it is in the Power of the Court to direct the Limitation of these personal Chattels to be. And where Things are directed by Will to go as Heir-looms with an Estate, or in Case of Marriage-Settlements, or the like, so far as they can by Law or Equity, 'tis very proper that it should be left to the Court to settle the Conveyance; and where it is left to the Court to do the Act, they have made as material Alterations in the Instrument as will be in the present Case, they having inserted a Clause for limiting an Estate to Trustees to preserve contingent Remainders. For these Reasons his Lordship's Opinion was, That the personal Chattels in Question were not to be considered as Part of the Estate of Sir *Thomas*, out of which the Plaintiff could have Satisfaction; and so his Lordship was pleased to decree accordingly.

How far a Court of Equity is to take Notice of the known Method of Conveyancing.

When it is left to a Court of Equity to settle the Conveyance, what Sort of Conveyance they will direct.

The *Attorney General* argued on the Part of the Defendant, and for Authority cited the Case of *Johnson* and *Criſs*, determined by Lord *Talbot* in 1734. And,

Mr. *Chute*, on the ſame Side, cited the Case of *Jones* and *Brooks*, determined in this Court the 26th of November 1736; and likewise the Case of *Salt* and *Chambers*, determined the laſt Term by the preſent Chancellor.

This Cauſe came to be heard a few Days ago before the *Maſter of the Rolls*, who ſat for Lord Chancellor; and his Honour thought that it was a Case that was proper a little to be thought of; whereupon he ordered it to ſtand for Judgment as of to-day; and now he was pleaſed to deliver his Opinion in it. He ſaid the ſingle Queſtion for the Conſideration of the Court was, Whether there is an undispoſed Moiety of the Eſtate of the Teſtatrix belonging to the next of Kin? And that depends upon this Queſtion, whether *Francis Sall*, one of the Executors, is a Trustee of this Moiety, or not? The Case is no more than this; *Martha Hill* having no Children, and having ſeveral Nephews and Nieces, makes her Teſtament in Writing; ſhe begins with ſaying, *As to my Temporal Eſtate, I diſpoſe thereof as follows*; ſhe then gives ſeveral Legacies, and particularly to all her Nephews and Nieces, excepting *James*; but of him ſhe ſays nothing one Way nor other; then comes the Clause on which the preſent Queſtion depends; ſhe thereby ſays ſhe gives to her Siſter *Sall*, who was her Siſter of the whole Blood, all her Houſhold Goods and Chattels whatſoever, whether in Houſes, Grounds, Rents, Stocks, Bills, Bonds, Ready Money, Jewels, Plate, or otherwiſe, and ſays too ſhe gives the ſame to the Defendant *Francis Sall* and *Judith* his Wife, for her Life, and after her Decease, ſhe gave one half of ſuch Reſidue of her Eſtate, after her Legacies and Funeral Expences paid, unto the Plaintiffs *Martha*, *Sarah* and *Judith Willis*, equally to be divided between them;

Where an Executor ſhall be a Trustee of the Reſiduum by Reason of his having a Legacy given him.

and appointed *Francis* and *Judith Sall* joint Executors of her Will.

Construc-
tion of these
Words, viz.
As to my tem-
poral Estate,
I dispose
thereof as
follows.

Where a Le-
gacy shall be
said to be
given to the
Husband in
his own
Right, and
not barely
in the Right
of his Wife.

It is contended by the Counsel for the Plaintiffs, that by this Will, *Francis Sall* the Executor has something given him, and consequently that he thereby becomes a Trustee of the *Residuum*. On the other Hand it is insisted, That in Reality *Francis Sall* has no Legacy given him; and that with regard to him it is just the same as if all had been given to his Wife. And farther it is insisted, on the Part of the Defendant, That at least it is no such Legacy as will make him a Trustee of the *Residuum*. The Will begins with saying; "As to my temporal Estate, I dispose thereof as follows." His Honour said, he did not much rely upon this Clause in the Will; Clauses of this Kind are, generally speaking, customary Forms; there may be indeed Cases, where the Matter may be so doubtful, that Clauses of this Sort will be of Weight; and an Argument may be drawn from Clauses of this Kind, in order to increase the Fund for the Payment of Creditors; and the strongest Case that he knew of, wherein the Court have laid Weight upon a Clause of this Kind, was that of *Cordle and Noden* in 2 *Vern.* 148. The next Thing, that he should lay out of the Case, was the Legacy given to the next of Kin; it is not given to all of them, for *James* is omitted; and if it had, it would have made no Difference. The material Questions in the present Case to be considered, are, *First*, Whether by the present Will there is not a Legacy given to the Husband? And, *2dly*, Supposing that there is, Whether such Legacy does not make the Husband to be a Trustee of the Moiety, which otherwise he would be intitled to? With regard to the first of these Questions, it has been indeed insisted by the Counsel for the Defendant, that by this Will there is no Legacy given to the Husband; but his Honour's Opinion was, that it was impossible to support that Doctrine; it is to contradict the express Words of the Will, and that for no other Reason, but

but to make a Man to take differently from what the Will says he shall, only because it is his Interest to do so. 'Tis indeed true, that the Clause of the Will, which this Question depends upon, does begin with saying, *I give to my Sister Sall all my Household Goods, &c.* And in that Part of the Clause, *Francis*, the Husband, is not taken Notice of; but that very Sentence says, *I give the same to Francis Sall, and Judith his Wife, for her Life, and after her Decease, one half thereof, after her Legacies and Funeral Expences paid, unto the Plaintiffs*; it has been indeed said, that *Francis* the Husband would have taken as great a Benefit from this Will, if he had not been named in this Clause, as he does by being named in it. And an Argument has been drawn from thence, that therefore the inserting his Name in this Clause of the Will shall signify nothing; but in reality he does take in a different Manner, by being named in this Clause of the Will, than otherwise he would. Had he not been named in it, he could only have taken in the Right of his Wife, whereas, by being named in it, he takes in his own Right, and this makes a very material Difference in this Court, tho' at Law it does not. Had he applied to this Court for the Goods, without being named in the Will, this Court might not have assisted him, without putting some Terms upon him; but as he is named in the Will, 'tis out of the Power of the Court to put any Terms upon him. Another Difference of Weight in the present Case is, that by being named in the Will together with his Wife, there is a Right of Survivorship between them, which otherwise there would not be. Besides, Part of this Estate might consist in Choses in Action; and in that Case, provided he had not been named in the Will, a voluntary Assignment of them would not in some Cases be good; and that was agreed in the Case of Lord *Carteret* and *Pasquill*. Suppose too this Estate consisted of Rents reserved upon any Terms for Years, and those Rents were in arrear on the Death of the Wife, there would be a greater Benefit as to those Rents, with regard to the Husband by

Where a Husband shall be said to take in his own Right, where only in the Right of his Wife.

How far a Husband shall not have a Power of making a voluntary Assignment of Choses in Action belonging to his Wife.

Where an
Executor
shall be a
Trustee of
the Surplus
for the Be-
nefit of the
next of Kin.

by his having been named in the Will, than there would if he had not been named in it. And as by these Instances it appears, that the Husband does take as Legatee by the Will, his Honour said he would now consider the second Question; namely, Whether by his so taking he does not become a Trustee of the Surplus for the Benefit of the next of Kin? He said it was very true, that he could not recollect any Case, that directly comes up to the present one, but there have been several that come very near it. This Point must be taken for an established one, that in this Court an Executor may be a Trustee of the Surplus for the Benefit of the next of Kin. At Law indeed it is otherwise; and the Reason for this Difference is not, that this Court controls the Law, and is inconsistent with it; but because this Court determines upon an equitable Point; namely, a Trust, which the Courts of Law have nothing to do with. And as the Court in this Case determines about a Trust, it will only consider, whether it was the Testator's Intention, that there should be a Trust or not; and therefore in this Case the proper Question to be considered is not, whether the Testator intended to give the Surplus to his next of Kin; but whether he intended to give it from them. By Law they are clearly intitled to it, where no Will is made; and therefore, whether he intended to take it away from them, or not, in these Cases, is the Question. The general Rule upon this Head is, That where a particular Bequest is given to the Executor, the Court presumes that the Testator intends, that he should be a Trustee of the Surplus. And if he contends, that he is not excluded from it, 'tis incumbent upon him to shew it. Originally perhaps this Notion of an Executor's being in such Case a Trustee was founded upon slight Grounds; but afterwards, as personal Estate begun to increase, this Notion of his being a Trustee has spread and enlarged. The material Cases on the other Side, cited by the Defendant's Counsel, are those in *Precedents in Chancery* 232, 316. and 2 *Vern.* 633, 648. together

gether with the Cases of *Johnson* and *Criss*, *Jones* and *Brooks*, and that of *Salt* and *Chambers*. But his Honour shew'd, that they were all distinguishable from the present one; and so he was pleased to decree accordingly.

The Dutchess of Marlborough and others June 20.
against *The Duke of Marlborough and*
others.

IN 1712 *John* Duke of *Marlborough* executed a Deed, whereby he vested 400,000 *l.* in the Hands of Trustees, in Trust that they should lay out the same in the Purchase of Lands; and that those Lands, when purchased, should be to the Use of himself for Life, with several Remainders over. This Deed was subject to a Power of Revocation. In Pursuance of this Deed, Lands were purchased with this Money. Accordingly in 1721, the Duke made his Will, and thereby reciting this Deed of Trust, and in particular the Power of Revocation, he declares, That by Virtue of that Power reposed in him, he revokes the Trust of those Estates, and all other Matters and Things created by that Deed. He then, by this same Will, vests those Estates in new Trustees, and appoints the same to different Uses. The Will then takes Notice of a Pension, payable out of the Post-office, of 5000 *l.* per Ann. settled by Parliament upon the Duke, by way of Acknowledgment for the Services he had done his Country; which Pension was given to the Duke for Life, the Remainder to the Dutchess for Life, with divers Remainders over. And the Will directs, that in case the Dutchess shall relinquish her Interest in this Pension, she shall have an Annuity of the same Value, chargeable upon all the rest of his Estate. Besides this Annuity, the Duke gives her another of 15,000 *l.* per Ann. more, chargeable upon all his Estate; he gives likewise an Annuity of 5000 *l.* per Ann. to the

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Earl of *Godolphin* ; an Annuity of 2000 *l. per Ann.* payable to Mr. *John Spencer*, and some other Annuities ; all which amounted in the Whole to 32,000 *l. per Annum*, and which were a Charge upon his whole Estate. And all his Estate, subject to these Annuities, the Duke gives to certain Persons for Life, Remainder to their first and other Sons in Tail Male ; and then directs, that it shall be in the Power of the Trustees, and the Survivors of them, and the Heirs of such Survivors, as often as any of those Tenants for Life shall have a Son, to revoke the Remainder in Tail, which would be in such Son, and to make him Tenant for Life only, with certain Powers therein mentioned ; and that, as often as such Sons shall be born, a new Settlement shall be made by the Trustees accordingly. And then the Duke directs by his Will, that all his personal Estate shall be laid out in the Purchase of Land, and go to the same Uses as were before mentioned. The Duke died, and upon his Death the Dutches of *Marlborough* was the only Trustee, that acted under his Will ; she possessed herself of his whole real and personal Estate, paid the Annuities, and accounted for the Surplus to the junior Dutches of *Marlborough*, who was intitled to it to the Time of her Death. She made likewise Purchases of Land, with great Part of the personal Estate ; but there was about 500,000 *l.* Part of that personal Estate, remaining, with which no Purchases had been made. *Charles* Duke of *Marlborough* was the Person now intitled to this Surplus of the Estate for his Life, deducting the Annuities ; and he has Issue a Son, the present Marquis of *Blandford*.

The present Bill was thereupon brought by the Dutches of *Marlborough*, and the other Trustees under the Will of the late Duke, against *Charles* Duke of *Marlborough*, against the Marquis of *Blandford* and others, praying, amongst other Things, that the Accounts might be passed from the Death of the junior Dutches of *Marlborough* to the present Time ; and that the Court would give their Directi-

ons what Kind of Settlement was to be made upon the Marquis of *Blandford*.

The principal Things insisted upon on the other Side were, that the Duke of *Marlborough* was intitled to have the Possession of the whole Estate, subject to the Annuities; and that the Marquis of *Blandford* was intitled to be a Remainder-man in Tail.

Lord Chancellor said, That at present he would not determine the Question, Whether the Marquis of *Blandford* is to be Remainder-man in Tail or not? He has heard, that the Invention, which was designed to be practised in the present Case, was first of all thought of by Lord *Aylsford*, and it has been inserted in the Settlement of some great Families; but he believed it had never received a judicial Determination, whether it was good or not. The Invention of Trustees, to preserve contingent Remainders, he has heard was first of all thought of by Sir *Geoffery Palmer*, and some other great Lawyers, who retired from the Bar during the Time of the Civil Wars. Accordingly, with regard to this Point, his Lordship was pleased to order, that it should be spoke to the next Term; when he would have the Assistance of the two Chief Justices, and the Chief Baron; and in the mean time directed, that Copies should be laid before them of the material Clauses in the Will; but with regard to the other Question, namely, concerning the Possession of the late Duke's Estate, his Lordship said, he would determine it now. He observed, it relates to different Kinds of Estate; and the present Duke of *Marlborough* prays to have the Possession of the Whole delivered to him, subject to the Annuities. One Part of this Estate consists of the Lands that have been purchased since the late Duke's Death, with his personal Estate; but these Purchases are not submitted to. The present Duke makes a little Doubt, whether they are proper Purchases or not. And therefore, with regard to these Estates, 'tis impossible to say, that the present Duke can be intitled to the Possession

How far a real Estate may be limited, notwithstanding the Doctrine of a Perpetuity.

At what Time the Invention first begun of inserting Clauses for vesting the Estate in Trustees, to preserve the contingent Remainders.

Whom a Court of Equity will direct to have the Possession of an Estate.

Where the Possession shall not be taken out of the Hands of Trustees.

session of them. Another Part of the late Duke's Estate consists of personal Estate, not yet laid out in Purchases of Land; and with regard to that Estate likewise, the present Duke cannot be intitled to the Possession of it; 'twas a Sum of Money directed to be laid out in the Purchase of Land. The Trustees have not been able to find Purchases to lay it out in; and till they have so done, or that there is some Default in them, the personal Estate cannot be taken from them. The only Question therefore remaining to be considered is, who shall have the Possession of the real Estate, which the late Duke died seised of. It consisted of three Parts; one was the Pension of 5000*l. per Annum*, chargeable out of the Post-Office; another, the real Estate, wherein the late Duke had the legal Interest; and the third, the real Estate, which the late Duke had only the Trust of. With regard to the first of these, it is extremely plain, that the Duke is intitled to the Possession of that. The Dutches has made her Election to take her Annuity of 5000*l. per Annum*, chargeable upon his whole Estate, in the Room of this Pension; so that she is not intitled to any Interest in the Pension it self. The Annuitants have not even a Charge upon this, and the present Duke is Tenant for Life of it; so that it is very plain, that he is intitled to the Possession of that. The next Question is, Whether the present Duke is not intitled to the Possession of the two other Kinds of the real Estate, in one of which the late Duke was seised of the legal Estate, in the other of which he was seised of the Trust, under the Deed of 1712? And with regard to both these Estates his Lordship's Opinion was, That the present Duke was well intitled to have the Possession of them. As to the first of these, there are indeed considerable Rent-charges created upon it; but it is an Inconsistency, that the same Person should have a Rent-charge out of Land, and at the same Time be intitled to the Possession of that Land. The remaining Question is, with regard to the real Estate which the late Duke had in Trust at the Time of his Death; and his Lordship thought it was certain, that the present Duke

was intituled to the Possession of that Estate likewise. It has been taken for granted, that the legal Interest in that Estate continues in the Names of the Trustees under the Deed of 1712; but the contrary rather appears by the Will of the late Duke; for by that Will he says, that he revokes not only the Trust of the Estate under the Deed of 1712, but all other Matters and Things; so that by that Means he seems to design to alter the legal Interest in that Estate, as well as the Trust of it; and if this was not so, it is well known that it is a frequent Bill in this Court, by those that are intituled to the Trust of an Estate, to pray a legal Conveyance of it, and to have the Possession decreed to them. So that, with regard to this Estate likewise, the present Duke must be intituled to have the Possession of it; nor can any Instance be produced of the Possession being kept from those that are intituled to an Interest for Life in the Estate, and such Possession allowed to Annuitants. If the Annuities are not paid, the Court will appoint a Receiver; and that is the proper Method to be taken; that was done in the Case of the late Duke of *Buckingham* and the late Earl of *Anglesea*, in the Time of Lord Keeper *Wright*; and a Receiver was applied for in the Year 1720. This answers all Objections about the Difficulty of Distraining for these Rent-charges in the present Case. Nor is it any Objection to say, that the present Duke is not intituled to the Possession of these Estates, by reason that he has not brought a Cross Bill for that Purpose. The present Bill is brought to have the Directions of the Court concerning the Trust under the Will of the late Duke; and on a Bill of this Kind the Court may give a Direction, that one of the Defendants shall have the Possession of such Part of the Estate, as it sees that Defendant intituled unto. And so his Lordship was pleased to decree accordingly.

Where a Deed shall revoke the legal Interest of an Estate, as well as the Trust of it.

Where those, that are intituled to the Trust of an Estate may bring a Bill, in order to have a legal Conveyance of it, and to have the Possession.

Where the Court will appoint a Receiver in Favour of Annuitants.

Where the Court will decree Possession to be deliver'd to a Defendant, notwithstanding he has not brought a Cross Bill for that Purpose.

June 30.

Atkinson and Turner.

IN 1731 *Richard Turner* made his Will, and thereby gave to *Christopher Atkinson* and others 2000 *l.* 1400 *l.* whereof he appointed to be paid out of a Sum of Money then due to him from *Gregory*, and the Remainder out of the rest of his personal Estate; and willed, that the 2000 *l.* should be paid to them equally, and to their Sons at their respective Ages of Twenty-one Years, and to their Daughters at their like Ages or Marriages, or so soon after as the same should be gotten in, with such Interest for the 1400 *l.* as should be received for the same after his Decease; which Interest he directed should be applied for the Plaintiffs Education and Maintenance; and if any of them should die before the Shares of the 2000 *l.* and the Interest should become due, that then the Shares of such of them so dying should go to the Survivors in like equal Shares. And farther, the Testator taking Notice, that he was intitled to three eighth Parts and Shares of the Joint-stock and Trade in Copartnership of a common Brewer, carried on in the *Cross Keys* Brew-house, between him and *Collinson* and *Gregory*, he thereby gave two Parts of the three eighth Parts to *Richard Turner* an Infant, subject to the Agreements of the Partnership, or such Copartnership as should, at his Death, be carrying on in this Brew-house; provided *Richard Turner*, the Infant, should live to attain his full Age of Twenty-one Years; but if he should happen to die before he should attain that Age, then the Testator gave the two eighth Parts amongst the Plaintiffs in the Manner as the 2000 *l.* is given; and the other third eighth Part of the Testator's Partnership Stock he, by his Codicil, gave to his Kinsman *Thomas North*, who since sold the same; and the Testator, by his will and Codicil, gave all the Residue of his personal Estate to the Plaintiffs, and *William Walling* deceased, to be paid to them in like Manner as the 2000 *l.* is to be paid;

paid; and directed, that in case any of them should happen to die before their Shares became payable, the Shares of such of them dying should be paid to the Survivors of them in like Manner, and appointed *William Cort* and *Thomas Inwen* Executors.

In 1732 *Thomas Turner* and *Richard* his Son exhibited their Bill against *Cort* and *Inwen*, as Executors of the Testator, against *Collinson* and *Gregory* his Copartners, *Thomas North* his Legatee, and others who were next of Kin to the Testator, who insisted they were intitled to the Interest of the two Eighths of the Copartnership Effects, as being an undisposed Part of the Testator's Estate, and prayed, amongst other Things, that the Executors might account to them, in the Right of the Infant, for the Interest and Produce of the two Eighths arising from this Brew-house.

This Cause was heard before the late *Lord Chancellor*, who thereupon decreed, That the Partnership should be carried on by *Collinson* and *Gregory* for the Benefit of all Parties; and that such Accounts should be taken of the Profits of the Partnership, until the Time of the Decree, as therein is directed. And as to the two eighth Parts of the Copartnership Trade, and of the Debts due to the same, and of the Profits that might arise from the same during the Minority of *Richard Turner* the Infant, after Deduction of the Debts and Losses, his Lordship declared, That *Richard Turner* the Infant would be intitled unto the same, if he should attain his Age of Twenty-one Years; and Liberty was given by the Decree for all Parties to resort to the Court for farther Directions, as Occasion should require. *Richard Turner* the Infant died in *October 1738*, being then of the Age of Twelve Years only, unmarried; *Thomas Turner*, the Infant's Father, took out Administration to him, and under that Right insisted upon it, that he was intitled to all the Benefit that was made of the two Eighths of the Partnership Stock, that accrued after
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the Death of the Testator, and before the Death of the Infant.

Thereupon the present Bill was brought by *Christopher Atkinson* and others, who were intituled to the Principal in the two Eighths of the Stock, against *Cort*, the Executor of *Richard Turner* the original Testator, against the Administrator of *Richard*, the Infant, against *Collinson* and *Gregory*, the Copartners in this Trade, and against *Jacob Thomson*, who was a Trustee for a Sharer in this Stock, praying, amongst other Things, that *Cort* the Executor might account to the Plaintiffs for the Interest and Produce that was made in the two Eighths of the Stock after the Death of the Testator, and before the Death of the Infant.

Mr. *Hoskins* argued on the Part of the Defendants, and for Authority cited 1 *Vent.* 199. *Salk.* 570. 3 *Lev.* 132. and 1 *Roll. Abr.* 415. cited in that Case in *Levinz.*

Where a Legacy shall be said to be a vested Interest before the Party attains his Age.

Where a Real Estate shall be said to be vested.

His Honour said, that the only Dispute in the present Case related to the intermediate Profits of the two Eighths of this Brewer's Trade, arising after the Death of the Testator, and before the Death of *Richard Turner* the Infant. For as the Infant is dead there is no Sort of Doubt, but the Capital of the two Eighths of this Stock belongs to the Plaintiff. This Question wholly depends upon the Consideration, whether, during the Minority of the Infant, the two Eighths of this Stock was a vested Interest in him, or not. This Sort of Question concerning vested Interests has come before the Court in a great many Shapes, relating both to real and personal Estates. But there seems to be a prodigious Difference, whether such Question relates to real, or whether it relates to personal Estates; for when it relates to real Estates, the Court always favours the Vesting of the Interest, by reason of the great Inconvenience in having the Freehold to be in Abeyance; but in the Case of personal Estate, there is no such Inconvenience; and therefore it stands indifferent, whether in that Case the

Estate is to be vested, or not; but before it is proper to give an Opinion, whether the Interest is vested, or not, a previous Question is necessary to be considered, whether the Point has not already been determined by the former Decree. But as to that, his Honour's Opinion was, that it has not. 'Tis indeed true, that on the Hearing the former Cause, the late Chancellor certainly inclined to think that the Share of the two Eighths in this Stock was not a vested Interest; but the Decree that his Lordship there made was not such a one as could be pleaded in Bar to the present Demand.

To make a Decree to be such a one, as that it may be pleaded in Bar, it is necessary, that it should bind both Parties; but that it could not do in the present Case, by Reason that the Plaintiffs in this Cause were not Parties to that Suit. And the Decree is worded in such a Manner, as to prevent determining that Point. The principal Question there was, whether *Cort* the Executor should be obliged to carry on the Partnership, or not. *Cort* insisted, that as Executor he could not be obliged to do it for the Benefit of the Infant; and in Reality *Cort* had a Mind to determine the Partnership, in order to carry on the Trade himself. The Court decreed, that he should carry it on, and should not determine the Partnership; but would not determine the Point, Whether in all Events the Infant would be intitled to the Profits; and that appears by these Words in the Decree, whereby his Lordship determined, that the Infant would be intitled to them, *when and if he should attain to his Age of Twenty-one.* Had the Infant been absolutely intitled to them, his Lordship would have directed, that the Infant should have a Maintenance out of them in the mean Time, which he has not done. This Matter then relating to the Decree being laid out of the Case, his Honour said, he would now consider the Question before-mentioned, Whether this was an Interest vested, or not; and his Opinion was, that it was not. In the Case of *Withers* and *King*, which was in the House of Lords, all the Pains were taken to make the Interest there

Where a Decree in a former Cause may be pleaded in Bar.

Where an Executor shall be obliged to carry on the Partnership for the Benefit of an Infant Legatee, who will be intitled when he comes of Age.

J. C. 3. Wm. 4. 13.

Where there
shall be no
Distinction
made be-
tween one
Chattel In-
terest and
another.

to be a vested one, that possibly could be; but it could not be done. Had this been a Money Legacy, there is no Sort of Doubt, but that it would not have been a vested one, till the Infant attained his Age; and his Honour saw no substantial Difference between that Case and the present one. He said, that he thought it was dangerous to admit of nice Distinctions in these Sort of Cases between one Chattel Interest and another; and that it was best to abide by a general Rule; and so his Honour was pleased to decree accordingly.

July 1.
1734.
At the Rolls.

Elliot and Merryman.

*2. Atk. 41. Notes from loose papers
of Sir Thomas Sewel vol. 1. p. 38.*

Thomas Smith became indebted to several Persons by Bond, and likewise by Simple Contract. In three of these Bonds Goodwin was bound with him as Surety; and afterwards Goodwin gave his own Bond alone to one of the Creditors, to whom Smith was bound in a single Bond. Smith being thus indebted made his Will, and in the Beginning of it says, "My Will is, that all my Debts be paid; and "I do charge all my Lands with the Payment thereof." Then came the Clause, upon which, together with the other Circumstances of the Case, the present Question principally determines. "Item, I give all my real and personal Estate to ----- Goodwin, to hold to him, his Heirs, Executors, Administrators and Assigns, chargeable nevertheless with the Payment of all my Debts and Legacies." Of this Will he made Goodwin his Executor. The Testator died in 1724; Goodwin prov'd the Will, and in that same Year sold a Freehold Estate of the Testator's to Hunt; in the Year following sold a Leasehold Estate of the Testator's to Wright; and in 1727 sold another Estate of the Testator's, consisting of both Freehold and Leasehold, to Merryman. In the several Deeds, by which these Estates were conveyed from Goodwin to the Purchasers, the Will of Smith was recited; and to one of those Deeds Elliott, a Creditor of Smith, was a subscribing Witness. These
Lands

Lands were sold in the Neighbourhood by Outcry. At the Time of these Sales the Creditors, all of them, either lived in the Town where *Goodwin* lived, or within three or four Miles of it. During all this Time, and till the Year 1730, the Creditors went on regularly, receiving their Interest, which was at 5 *l. per Cent.* of *Goodwin*. *Goodwin* was a solvent Man till 1732, and then he became a Bankrupt.

In 1734 the present Bill was brought by the Creditors of *Smith*, against the Purchasers of these Lands, that have been mentioned, against *Goodwin*, and against the Assignees under his Commission, in order to have a Satisfaction of their Debts out of those Lands which were sold by *Goodwin*.

Mr. *Chute* argued on the Part of the Plaintiffs, and for Authority cited 2 *Vern.* 528, 616. *Pagett* and *Hoskins* in *Precedents in Chancery*, and the Case of *Morley* and *Webb*, determined by the present *Chancellor*.

Mr. *Idle* on the same Side cited 2 *Vern.* 444.

And on the same Side Mr. *Murray* cited the Case of *Newgent* and *Gifford*, determined by the present *Chancellor*.

Mr. *Browne* argued as Counsel for *Hunt* and *White*, and for Authority cited *Chancery Cases* 115. and the Case of *Abott* and *Gibbs*.

Mr. *Noel* argued on the same Side, and cited 1 *Vern.* 45, 411. and *Williams* 430.

Mr. *Hoskins* argued as Counsel for *Merryman*, and cited 1 *Vern.* 303.

His Honour said, his Opinion was, that the Plaintiffs were not intitled to the Relief they sought by the Bill.

Bill. He said it was very true, that it was almost impossible to make a Determination in the present Case, but that it must fall out unfortunately on the one Party or the other. The Dispute arising between Creditors on the one Side and Purchasers on the other, both these Sorts of Persons are intitled to the Favour of this Court; and in the present Case a Misfortune must fall upon one of them. On whom it is to fall is the Question. And this is a Question that must so frequently have happened, that it is extraordinary to find no Determination directly in Point. The Case is this; *Thomas Smith*, being possessed of a real and personal Estate, was indebted to several Persons by Bond; in three of which Bonds *Goodwin* was bound with him as Surety; and he had contracted likewise some other Debts; and being thus indebted he makes his Will to the following Effect. The Will begins with this Introduction. "My Will is, that all my Debts be paid; and I do charge
 "all my Lands with the Payment thereof. *Item*, I give
 "all my real and personal Estate to ----- *Goodwin*, to
 "hold to him, his Heirs, Executors, Administrators and
 "Assigns, chargeable nevertheless with the Payment of
 "my Debts and Legacies." 'Tis indeed true, that these Words do not amount to a Devise of the Lands to be sold for the Payment of the Debts; and they only import a Charge upon them for that Purpose. However, this is such a Devise, as is within the Meaning of the Proviso of the Statute of fraudulent Devises, and does interrupt the Descent to the Heir at Law. By this Will the Devisee was made Executor. The Testator died in 1724. *Goodwin* paid Interest for the Debts at 5 *l. per Cent.* regularly till 1730. After the Testator's Death three Sales of this Estate were made by *Goodwin*; one, of an Estate which was intirely Freehold; the other, of an Estate intirely Leasehold; and a Third, consisting of Freehold and Leasehold both. The Bill in general is brought by the Creditors of *Smith* against the Purchasers, in order to have a Payment of their Debts out of the Lands of *Smith*, which were sold to them by
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Goodwin.

What words do not amount to a Devise of Lands to be sold for Payment of Debts.

What is such a Devise, as is within the Meaning of the Statute of fraudulent Devises.

Goodwin. With regard to the Leasehold Estate, the Case is so extremely plain, that the Sale of that must stand, and that the Creditors cannot have a Satisfaction out of it, that his Honour said, it would be monstrous to call it in Question. The Executors are the proper Persons, that by Law have a Power to dispose of a Testator's personal Estate. 'Tis indeed true, that personal Estate may be cloathed with such a particular Trust, that it is possible the Court, in some Cases, may require a Purchaser of it to see the Money rightly applied. But unless there is some such particular Trust, or a Fraud in the Case, it is impossible to say but the Sale of the personal Estate, when made by an Executor, must stand; and that after the Sale is made, the Creditors cannot break in upon it. His Honour said, he would now consider the other Sales, that have been made, and would examine those; first, upon the general Rules of the Court; and in the next Place, upon the particular Circumstances which this Case is attended with. With regard to the first of these Matters, the general Rule is, that if a Trust directs, that Land should be sold for the Payment of Debts generally, the Purchaser is not bound to see that the Money be rightly applied. On the other Hand, if the Trust directs, that Lands should be sold for the Payment of certain Debts, mentioning in particular to whom those Debts were owing, the Purchaser is bound to see that the Money be applied for the Payment of those Debts. The present Case indeed does not fall within either of these Rules, because here Lands are not given to be sold for the Payment of Debts, but are only charged with such Payment. However, the Question is, Whether that Circumstance makes any Difference? And his Honour was of Opinion, that it did not. And if such a Distinction was to be made, the Consequence would be, that whenever Lands are charged with the Payment of Debts generally, they could never be

Where Creditors cannot come upon Purchasers for a Satisfaction of their Debts.

Where a Purchaser shall be bound to see the Money rightly applied.

Where a personal Estate, in the Hands of an Executor, shall be cloathed with such a particular Trust, that a Purchaser of it shall be obliged to see, that the Money be rightly applied by the Executor.

Where a Purchaser shall not be bound to see the Money rightly applied, when the Estate is given to be sold for Payment of Debts generally. *See acc. 1. Ver. 215.*

Where he shall be bound to see the Money rightly applied, when the Land is given for the Payment of certain

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Debts, particularly mentioning the Persons to whom they are to be paid. Where a Purchaser shall be obliged to see, that the Money be rightly applied, when the Lands which he purchased are charged with the Payment of Debts.

How far the charging Lands with the Payment of Debts does not differ from the directing them to be sold for such Purpose.

Where lands are charged with the Payment of Annuities, how far a Purchaser must see, that the Purchase Money be rightly applied.

Where Persons shall be presumed to have Notice of Purchases being made.

discharged of that Trust without a Suit in this Court; which would be extremely inconvenient. No Instances have been produced to shew, that in any other Respect the charging Lands with the Payment of Debts differs from the directing them to be sold for such a Purpose; and therefore there is no Reason that there should be a Difference established in this Respect. The only Objection, that seem'd to be of Weight with regard to this Matter, is, that where Lands are appointed to be sold for the Payment of Debts generally, the Trust may be said to be performed as soon as those Lands are sold; but where they are only charged with the Payment of Debts, it may be said, that the Trust is not performed till those Debts are discharged. And so far indeed is true, that where Lands are charged with the Payment of Annuities, those Lands will be charged in the Hands of the Purchaser, because it was the very Purpose of making the Lands a Fund for that Payment, that it should be a constant and subsisting Fund; but where Lands are not burdened with such a subsisting Charge, the Purchaser ought not to be bound to look to the Application of the Money; and that seems to be the true Distinction. Having thus considered the Case under the general Rule, his Honour said, he would now consider it under the particular Circumstances that attend it; and the particular Circumstances are such as are far from strengthening the Plaintiffs Case, but rather the contrary. One of those Circumstances is the Length of Time the Plaintiffs have lain by, without at all insisting on any Charge upon these Estates. *Goodwin* was a solvent Man till his Bankruptcy in 1732. Here have been three Purchases of these Estates, made at different Times, the one in 1727, the other two in 1725 and 1724; the first of them was made by *Hunt*, the second by *White*, and the third by *Merryman*. During all these Transactions the Plaintiffs do not mention one Word of their Charge upon this Estate; but on the contrary regularly received their Interest of *Goodwin* till the Year 1730. 'Tis indeed true, that there is no express Proof, that the Plaintiffs knew of these Purchases, but there is

is Reason to imagine that they did. The Purchases were made in the Neighbourhood by Outcry; some of the Creditors lived in the same Town that *Goodwin* did, and all of them lived within three or four Miles of him; and *Elliot*, one of the Creditors, was a subscribing Witness to one of the Purchase Deeds. The Want of Notice too, on the Part of the Purchasers, is a considerable Circumstance in their Favour. 'Tis indeed true, that they had Notice that there were Debts chargeable upon this Estate; but it does not appear they knew to whom those Debts were owing. Another Circumstance is, that *Goodwin* was a Co-obligor in three of these Bonds, and to another of the Obligees he afterwards gave his Bond alone, which may well be considered as a Satisfaction for that Bond. By this it appears, that the Creditors greatly relied upon *Goodwin* for their Pay-master; and there is not much Reason therefore, that they should now be allowed to resort to the Testator's Estate. Upon the Whole, his Honour's Opinion was, That the Plaintiffs Bill must be dismissed, and even with Costs, as against *White*, there being no Manner of Pretence for the Plaintiffs to come upon that Estate, it being all Leasehold, and sold to *White* by the Executor, who by Law is the proper Person intrusted to dispose of the Testator's personal Estate. However, with regard to the rest of the Defendants, his Honour said, he would only dismiss the Bill generally, without Costs; and so he was pleased to decree accordingly.

Whom Persons shall be said to rely upon for their Pay-master.

Huggins and The York-Buildings Company. July 6.
1. C. 2. v. 44. 2. 29. v. 3. p. 14.

AN original Bill had been brought by an Administrator of a Judgment-Creditor; the Administrator died, and a Bill of Revivor was thereupon brought by the Executor of the Administrator. This Bill was thought to be wrong, and thereupon another Bill of Revivor was brought by the same Plaintiff, having taken out Administration *de bonis non* to the Judgment-Creditor himself, and in the second

cond Bill of Revivor described himself as Executor to the Administrator, and likewise as Administrator *de bonis non* of the original Judgment-Creditor. To this second Bill of Revivor the Pendency of the former Bill was pleaded; thereupon it was referred to a Master, to examine whether these two Bills were for one and the same Matter. The Master made a special Report, whereby he certified, that the latter Bill related to the same Matter, and that they were both brought by the same Person; but that they were brought by him in the different Rights, that have been mentioned.

Thereupon Mr. *Chute* moved, That the first Bill of Revivor might be dismissed, with 20 s. Costs; that the Plea might be set aside, and that the Suit might stand revived on the second Bill.

Where a
Bill of Re-
vivor shall
be dismissed
with Costs
generally.

Lord Chancellor thought this a Matter proper to be considered of, and thereupon ordered it to stand over; and now his Lordship was pleased to deliver his Opinion in it. He said the first Part of the Motion is, that the first Bill of Revivor may be dismissed, with 20 s. Costs; but as to that, there is no Rule of the Court that limits the Costs in such Cases to 20 s. and therefore that Bill of Revivor must be dismissed with Costs generally. The next Question is with regard to the Plea; and indeed it is not much known what is to be done as to that. The printed Order of *Lord Clarendon* is in these Words. “ The Dependency of a former Suit for the same Matter is also a good Plea, and “ therefore the Defendant shall not be put to set it down “ with the Register; but if the Plaintiff be not satisfied “ therewith, the same shall be referred to one of the Masters of the Court to certify the Truth thereof; and if “ it shall be determined against the Plaintiff, he shall pay “ 5 l. Costs to the Defendant; but if such Reference shall “ be procured by the Plaintiff, and if a Report thereupon “ within one Month after the Filing of such Plea, then the “ Bill to stand dismissed of Course, with the ordinary “ Costs

“ Costs of seven Nobles.” The Practice under this Order has been, that when a Reference is made to a Master, of a Plea of the Pendency of a former Suit for the same Matter, if the Master reports, that both Bills are for the same Matter, the Plea shall be allowed, and the Party is intitled to Costs, and the Plea, in such Cases, cannot be set down to be argued; for then there would be two Dilatories; but the Plea is *ipso facto* over-ruled; and thereupon the Plaintiff takes out a *Subpœna* for 5 *l.* Costs, in like Manner as upon the arguing of a Plea. In the present Case the Master has done neither of these Things; for he has only made a special Report, and left the Matter to be determined by the Court. Thereupon the Matter now comes on by Motion; and one Part of it is, that the Plea may not stand in the Way. And the Foundation of this Part of the Motion is, that where the same Person sues in different Rights, it is the same as if there were different Persons. And this is certainly true; for which Reason the Plea must be set aside. However, it must not be set aside with Costs for two Reasons; first, Because the Plaintiff gave some Colour for the Plea, by bringing the first Bill of Revivor wrong; and secondly, Because, in the second Bill of Revivor, the Plaintiff described himself Executor to the Administrator, as well as Administrator *de bonis non* to the original Judgment-Creditor. The remaining Question, proper to be considered, is, Whether the Court should direct now, that the Suit should stand revived? It has been objected, That the Plaintiff ought to take out a *Subpœna* before the Court can order, that the Suit shall stand revived. But his Lordship said, that in the present Case it was not necessary. This is a plain Bill of Revivor. The Defendant must have indeed an Opportunity to shew Cause why the Suit should not stand revived. The Party may shew Cause against this by way of Answer; and here he has shewn Cause against it by way of Plea. But that Cause is not a sufficient one, for the Reason that he had before given; and therefore it is proper now to direct, that the Suit

Where a Plea shall not be set down to be argued.

What to Pleas of a former Bill depending for the same Matter.

Where the Party shall take out a *Subpœna* for 5 *l.* Costs.

Where a Court of Equity will set aside a Plea.

Where a Plea shall not be set aside with Costs.

Where the Court will direct, that a Suit shall stand revived.

Where the Plaintiff need not take out a *Subpœna* to revive.

How far a Defendant must have an Opportunity to shew Cause why a Suit should not stand

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shall

revived. In what Manner a Defendant may shew Cause why a Suit should not stand revived.

shall stand revived; and so his Lordship was pleased to order accordingly.

July 8.

Webb and Webb.

IN 1723 General *Webb* made his Will to the following Effect; he thereby gave to his eldest Son *Edmund* an Annuity of 100*l.* per Ann. for Life, and likewise took Notice of an Annuity of 200*l.* per Ann. limited by Deed to the Wife of *Edmund*, for her Jointure; and then charged all his real Estate for the Payment of these Annuities. He then goes on, and says, "I do hereby give, direct, limit and appoint unto my second Son *Borlace Richmond Webb*, all my Manors of *Haddefdon*," &c. particularly describing them, in strict Settlement, Remainder to *John* my third Son in like Remainder; and then came the following Clause; "Item, I give to my Son *Borlace* all other my Estates, real and personal, whatsoever and wheresoever, to hold to him, his Heirs, Executors, Administrators and Assigns, for ever. And farther, My Will is, and I do hereby direct, that my said Son *Borlace* shall pay and discharge all such Debts and Sums of Money as I shall owe at the Time of my Death, and all the Legacies and Sums of Money bequeathed by this my Will." Then comes the following Clause; "Item, I give and bequeath unto my Son *John*, and my Daughters *Henrietta*, *Alicia*, *Catherine* and *Frances*, and to all and every other Child or Children which I shall have by my now Wife at my Death, 2000*l.* apiece; the same to be paid to my Son at his Age of Twenty-one, and to my Daughters at their respective Days of Marriage. And my Will is, and I do hereby direct, that the several and respective Legacies or Portions, which shall not be due or payable to them before, by Virtue of this my Will, shall be raised and paid to my said Trustees, Lord *Limington*, *Strudwick* and *Strachan*, or the Survivor or Survivors of them, within two Years after my Death; and that my said Son *Borlace* shall pay

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" Inte-

“ Interest for the same respectively, after the Rate of 4 l.
“ *per Cent. per Ann.* immediately from and after my
“ Death, for and during the said two Years, or until the
“ same be paid unto my said Trustees; and that such In-
“ terest shall be paid Quarterly, unto and for the Use,
“ Benefit, Maintenance and Education of my said Chil-
“ dren respectively, in Manner following; That my said
“ Son *Borlace* shall pay unto my said Daughters *Henrietta*
“ and *Alicia* respectively the Interest of their respective
“ Portions, for their Use and Benefit; and shall also pay to
“ my said Trustees the Interest of the said Portions, thereby
“ given to my said Son and Daughters *Catherine* and *Frances*,
“ and my other Children, for their Maintenance, Use and
“ Benefit; to the Intent and Purpose, that my said Trustees
“ shall pay and allow thereout, for their respective Main-
“ tenance and Education, the Sum of 50 l. apiece; and
“ that they should lay up or improve the rest of the Inte-
“ rest of their respective Portions for their respective Use
“ and Benefit, and pay the same to them respectively,
“ when their respective Portions shall respectively become
“ due and payable to them, by Virtue of this my Will.”

But if his Son *Borlace* pays any of the said Portions before
the Expiration of the said two Years, then he directs the
Interest to cease.) “ But my Will is, That if my said Son
“ *John*, or any other Son or Sons I shall have or leave
“ by my said Wife, shall happen to die before he or they
“ attain the Age or Ages of Twenty-one Years respective-
“ ly, or if any my said Daughter or Daughters, which I
“ shall have or leave by my said Wife, or any or either
“ of them, shall happen to die unmarried, or if my said
“ Son *John*, or any other of my Daughters, or other
“ Children I shall have or leave as aforesaid, shall be mar-
“ ried during my Life-time, then, and in either of the
“ said Cases, the Portion or Fortune of such of them so
“ dying or marrying in my Life-time, together with the
“ Interest and Advantage that shall be made thereof,
“ which shall then be or remain in my Trustees Hands, af-
“ ter Payment of such their Maintenance as aforesaid,
“ shall

“ shall go and be paid to, or sunk for the Benefit of my
 “ said Son *Borlace Richmond Webb*.” The Testator died,
 and at the Time of his Death was seised of no other real
 Estate but that which he devised in strict Settlement. After
 the Testator’s Death *Borlace* died without Issue, and up-
 on his Death *John* became intitled to the Estate. One of
 the Daughters died after the two Years expired from
 the Death of the Testator; thereupon the present Bill
 was brought by *Hester Richmond Webb*, the Widow and
 Executrix of *Borlace*, against *John Richmond Webb* and
 others, in order to have an Account of the General’s
 Estate.

The principal Question in this Case was, Whether the
 Estate, devised in strict Settlement, was subject to the
 Payment of younger Childrens Portions?

Mr. *Murray* argued on the Part of the Plaintiffs, and for
 Authority cited the Case of *Clowdsly* and *Pelham* in *Vern.*
 the *Attorney General* and *Moor*, determined by the present
Chancellor, *Trotter* and *Vernon* in *Vern.* *Alcock* and *Sparhawke*
 in the same Report, *Wheel* and *Morris*, determined by Lord
Talbot, and Lord *Warrington* and *Booth*.

Mr. *Brown* argued on the other Side, and cited the Case
 of *Morgan* and *Perkins* in the House of Lords, *Coppelston*
 and *Bamfeild*’s Case, cited in that of the *Attorney General*
 and *Moor*, and *Corfeild* and *Lymgen*, March 3, 1739, be-
 fore the present *Chancellor*.

Mr. *Clark* on the same Side cited *Preced. in Chan.* 449.

Mr. Justice *Parker* heard this Cause for Lord *Chan-*
cellor, and said, his Opinion was, That this real Estate
 was well chargeable with the Payment of these Portions.
 These Portions are for the Benefit of younger Children,
 and younger Children are considered as Creditors in a
 Court

How far
 younger
 Children
 shall be con-
 sider’d as

Creditors even for Portions given them by their Father’s Will.

Court of Equity. Now in the Case of Creditors it has been held, That where a Testator, in the Beginning of his Will, declares, that he is disposing of all his worldly Estate, and then gives a Direction, that his Debts shall be paid; the Debts thereby become chargeable on the real Estate, as well as the personal. It has been said in the present Case, that the Testator has used proper Words to charge this real Estate with the Payment of the Annuity of 100 *l.* to his eldest Son *Edmund*, and of 200 *l.* *per Ann.* to his eldest Son's Wife; and as he has not used such Words in relation to these Portions, it is inferred from thence, that his Intent was not the same. But that Objection is not conclusive. A Testator may use express Words of Charging in one Part of his Will, and may create a Charge by Implication on another Part of it. It has been said, that the Testator has made a different Fund for Payment of his Legacies out of the Residue of his real Estate, which he gave to *Borlace*; and if the Fact was, that there was any such Residue, the Argument would be a good one; but there is no such Residue in Fact. The next Question proper to be considered is, Whether this is chargeable with the Portion given to the Daughter that is dead, as well as with the other Portions? And the Judge was of Opinion, that it was. 'Tis indeed true, that in general, where Land is charged with the Payment of Portions, and the Legatee dies before the Time of Payment, the Legacy shall not be raised, but sink for the Benefit of the Estate. But the present Case does not fall within that Rule, because the Portions are directed by the Will, to be raised and paid within two Years after the Death of the Testator; and the Daughter, that is now dead, survived those two Years; though, had she died within the two Years, it would have been otherwise. And so the Judge was pleased to decree accordingly.

Where Debts shall be charged by a Will on the real Estate.

Where lands shall be chargeable with the Payment of Portions.

Where a Portion shall sink into the real Estate, by reason of the Party's dying before the Time for raising it.

July 9.

Richards and Symms.

SYMS, who was a Relation of *Richards*, borrowed of him 3000*l.* and made him a Mortgage upon his Estate by way of Term for Years for that Sum. A Bond was likewise given for Performance of Covenants. At the Time this Mortgage was made, the Mother of *Syms* was uneasy at it; but *Richards* told her, in the Presence of *Syms*, that she need not; for it was in his Power to be kind to him. This Bond and Mortgage was kept in the Hands of a Trustee. A few Years after *Syms* came to *Richards's* House, and brought with him a Box, wherein this Bond and Mortgage was, and told him, that he had brought them him, in order that he might keep them himself. Upon this, as it was sworn on the Part of the Defendant, *Richards* put back the Deeds with his Hand, and said, *Take back your Writings, I freely forgive you the Debt*; and at the same Time, in the Presence of the Mother, said, *I always told you, that I would be kind to your Son; now you see that I am as good as my Word.* But this Evidence was contradicted on the Part of the Plaintiff. *Richards* died, and the Plaintiff claimed his Estate as his Son and Heir. Thereupon he brought this Bill against *Syms*, to compel him to pay his Mortgage Money, or else that he might stand foreclosed.

Mr. *Chute* argued as Counsel for the Plaintiff, and submitted it, that even supposing the Fact was true which was sworn on the Part of the Defendant, the Plaintiff was intitled to the Relief that he sought by his Bill; for that, as he conceived, the Case was within the Statute of Frauds and Perjuries.

The *Attorney General* argued on the other Side, and for Authority cited *Whitlock's Case Co. Litt. 380. Parris and Owen*, determined by his Lordship.

Mr. Noel on the same Side cited *Har.* 455.

And Mr. Murray on the same Side cited 2 *Rep.* 46. *Co. Litt. sec.* 377. *Shepard's Common Assurance, cap.* 4. 70. *cap.* 12. 421. and that of *Walmesly* and *Booth*, determined by this Chancellor.

Mr. ----- on the same Side cited 5 *Rep.* 23.

Lord Chancellor said, That this was a Bill brought not by the Defendant to have a Conveyance of the legal Estate from the Plaintiff, but by the Plaintiff, as Representative of a Mortgagee, to have the Money, supposed to be due upon the Mortgage, paid him, and in Default of that, to have a Foreclosure. The Consequence of this is, that the Plaintiff comes for Equity. And there are many Things by which a Man may rebut an Equity, which will not intitle him to come for an original one. Now supposing the Fact to be true which is insisted on by the Defendant, namely, That *Richards* the Mortgagee did voluntarily forgive the Debt in the Manner that has been sworn on the Part of the Defendant, his Lordship said his Opinion was, that the Plaintiff could not be intitled to Relief. Suppose the Mortgagee himself had brought this Bill, and the Fact that is mention'd is true, Could the Mortgagee himself be intitled to Relief? Now abstracted from the Question on the Statute of Frauds, his Lordship said he could not; because he would come for Equity in Contradiction to his own Act; and as the Mortgagee himself could not have been intitled to this Relief, if the Fact before mentioned be true, the Plaintiff can be in no better Condition. If the Plaintiff had any Remedy at Law for these Deeds, and was the Defendant to come for Equity, the Case might be of a different Nature. But the Law is against the Plaintiff, and therefore, if the Fact before mentioned be true, the Plaintiff's Bill must certainly be dismissed; but his Lordship

Where a
Man shall
be allowed
to rebut an
Equity.

The Difference between a Mortgagee's being Plaintiff in a Cause and being Defendant.

ship said, he was not willing the Matter should rest upon this strict Nicety of Distinction between the Representative of the Mortgagee's being a Plaintiff, and being a Defendant; for if this Bill should be dismissed, and the Plaintiff left to take his Remedy at Law, by bringing an Ejectment for the Estate, that would only make a Circuitry in having the present Plaintiff Defendant to another Bill, which he was not willing to introduce; and therefore his Lordship said, that it was better the mere Right should be determined upon the present Bill; and in order to do so, there would be two Questions proper to be considered; first, The Strength of the Evidence on the Part of the Defendant, relating to the forgiving of the Debt, which has been mentioned; and, secondly, What is the Operation arising from that Fact. Now the second of these Questions will be proper first to be considered. The Fact, as it is sworn on the Part of the Defendant, is, that when the Defendant came to the House of the Mortgagee with the Box of Writings, wherein the Mortgage and the Bond were, and offered them to the Mortgagee, the Mortgagee put the Deeds back with his Hand, and said, *Take back your Writings, I freely forgive you the Debt*; and then speaking to the Defendant's Mother, who was present, said, *I always told you, I would be kind to your Son, now you see I am as good as my Word*. The Question is, Whether, this being a Mortgaged Interest in Land, this Evidence can be allowed, consistent with the Statute of Frauds and Perjuries? The Rule upon this Head is the same in Law and in Equity; and his Lordship's Opinion was, that it might. The Statute indeed lays down a very strict but proper Rule, relating to real Estates, That no Interest, any longer than for three Years, shall pass in them without Writing, nor any Trust in them for a longer Time, unless the Trust arises by Operation of Law. The same Rule, by that Statute, relates to the Devising of real Estates. But in all these Cases there is a Difference, both in Law and Equity, between absolute Estates in Fee or for a Term of Years, and conditional

What Evidence shall be allowed in case of a Mortgage, consistent with the Statute of Frauds and Perjuries.

tional Estates for securing the Payment of a Sum of Money. In the Case of absolute Estates it cannot be admitted of, that Parol Evidence of the Gift of Deeds shall convey the Land it self. But where a Mortgage is made of an Estate, that is only considered as a Security for Money due, the Land is the Accident attending upon the other; and when the Debt is discharged, the Interest in the Land follows of Course. In Law the Interest in the Land is thereby defeated, and in Equity a Trust arises for the Benefit of the Mortgagor. In an Ejectment, where a Title is made under a Mortgage, if Evidence is given, that the Debt is satisfied, this is considered as defeating the Estate in the Land which the Mortgagee had, and in such Cases, especially where the Mortgage is antient, the Court will presume, that the Money was paid at the Day, and will direct the Jury to give their Verdict accordingly, unless it clearly appears, that the Money could not be paid at the Day; no Writing is in these Cases necessary; which shews, that even the Law considers the Debt as the Principal, and the Land to be only an Accident. Equity goes farther, and in all Cases says, That where the Debt appears to be satisfied, there arises a Trust by Operation of Law for the Benefit of the Mortgagor. And that Case is within the Exception in the Statute of Frauds, which has been mentioned of Trusts arising by Operation of Law; and in these Sort of Cases the Court receives any Kind of Evidence of Payment; and therefore if a Mortgage was made by one Partner to another, and the Mortgagor agreed with the other, that he should take a certain Part of the Profits of the Partnership in Discharge of the Mortgage, that of it self would discharge it; yet on the Ground which the Plaintiff in the present Case puts his Case upon, no such Parol Evidence could be given in these Cases of the Paying off a Mortgage. For it might be said, that this is to change the Trust of an Estate, and that shall not be done without its being reduced into Writing. This shews, that these Sorts of conditional Estates differ in this Respect from absolute ones. 'Tis indeed a Question, What Weight shall be laid

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upon

How far a Parol Gift of Deeds will not convey the Interest in the Land it self within the Statute of Frauds and Perjuries.

How far a Parol Gift of Mortgage Deed will discharge the Mortgage, notwithstanding the Statute of Frauds.

What shall be good Evidence at Law, that a Mortgage is satisfied.

What shall be good Evidence in Equity, that a Mortgage is satisfied.

What shall be said to be a Trust arising by Operation of Law.

upon such Sort of Evidence, as in the present Case is offered, and whether the Court will not keep a strict Hand upon the Party? and there may be Reason for that. But the Question, as his Lordship had before said, is, Whether this Evidence shall not be received to be a Gift or a Release of the Debt? And his Lordship thought, that it ought. Here is a Mortgage made, and a Bond at the same Time enter'd into, not indeed for the Payment of the Money secured by the Mortgage, but for Performance of the Covenants contained in it. Suppose an Obligee delivers up a Bond with an Intent to discharge the Debt, the Debt will certainly be thereby discharged; and if the Bond is discharged in the present Case, the Mortgage will be discharged with it. This brings the Question to the Evidence of the Fact, which has been mentioned, namely, Whether the Mortgagee did use such Expressions or not? And as to that the Evidence is doubtful; for which Reason that Fact must be tried in an Issue directed for that Purpose; and so his Lordship was pleased to decree accordingly.

July 15.

Newstead and Johnston.

S. C. 2. Atk. 45. Jordell v. Mfr. N. v. 2.

GRACE Lawson being a Clothier in *Yorkshire*, and in Partnership in that Trade with her Son in Law *Allen Johnston*, who married her Daughter *Elizabeth*, made her Will to the following Effect; she directed, that 1000*l.* should be taken out of her Stock, and laid out in the Purchase of Land, for the Benefit of her Son *William*, in strict Settlement. She gave a Legacy to her Daughter *Alice*, who married with *Raynold Newstead*, and then directed, that all the Residue of her Joint-Stock should be invested in the Hands of *John Senior*, his Executors and Administrators; she desires, that he may become a Partner with her Son in Law *Allen Johnston*; and as to the Profits that *Senior* shall be intitled to from his Share in the Partnership, she declares, that the same shall be in Trust for her Daughter *Elizabeth*, for her own separate Use, exclusive of

of her Husband's, during her Life, and after her Decease, to such Persons as *Elizabeth* shall give the same to by her Will, or some other Instrument in Writing. Of this Will *Grace Lawson* made *Elizabeth* her Executrix; *Grace Lawson* died, after her Death *Elizabeth* died likewise; *Reynold Newstead*, in the Right of *Alice*, insisted, that by the Legacy of the Stock given in Trust for the Benefit of *Elizabeth*, she was not intitled to the Surplus of the Estate of *Grace Lawson*, as her Executrix; but that she became a Trustee of it for the Benefit of the next of Kin. Thereupon the present Bill was brought by *Reynold Newstead* and *Alice* his Wife against *Allen Johnston* and his Children, in order to have the Surplus of *Graces's* Estates distributed according to the Statute of Distributions.

Mr. Noel argued on the Part of the Defendants, and for Authority cited 2 *Vern.* 675. *Abr. of Cases in Equity* 245. (10.) and *Williams* 2. 210.

Mr. Murray, on the same Side, cited the Case of *Griffith* and *Rogers* in *Precedents in Chancery*, *Lady Glanvill* and the Dutcheſs of *Beauford* in 1709. *Westcombe* and *Jones* in 1711; and *Precedents in Chancery* 576.

Mr. Brown, on the other Side, cited the Case of *Willis* and *Brady*, determined by the *Master of the Rolls* the last Term, sitting for his Lordship.

Lord Chancellor said, That the Authorities on this Head have been very various, and some of them clashing with one another. But the present Case is a very plain one; namely, that the Executrix is not excluded of the Surplus; the Rule of Law is clear on that Side of the Question, and the Rule of the Ecclesiastical Court is clear on the same Side. The Ecclesiastical Courts have indeed attempted to make an Executor distribute the Surplus when he has had a Legacy given him; but as often as they have
Where an Executrix shall not be a Trustee of the Surplus for the Benefit of the next of Kin.
so

so done, they have been prohibited. There were two Instances of such Prohibitions in the Time when Lord *Macclesfield* sat as Chief Justice, the one in the End of the late Queen's Time, the other some Time after; and he believed there was a Third of the like Kind granted, when he himself sat as Chief Justice. This shews, that the Ground of this Court's Decreeing the Surplus in such Cases to be distributed, is founded on Considerations of Equity and on some Fact, from whence arises a violent Presumption, amounting to Evidence, that the Executor was only to be a Trustee; the first Case on this Subject was, that of *Foster* and *Monk* in the Time of Lord *Jeffreys*; the Tradition of that Case he has heard to be, that Lord *Jeffreys* thought there was something of Fraud in the Party's getting to be made Executor, tho' no particular Evidence was given of a Fraud; and besides, Lord *Jeffreys* thought it absurd, that when the Executor had a Legacy of 5 *l.* given him for his Trouble, that he should claim the Rest of the Estate to his own Benefit. From that Time it has been taken, where an Executor has had a Legacy given him for his Care and Trouble, and no Disposition of the Surplus, that the Executor should be a Trustee of it; but the first of these Kind of Cases were only where a Legacy was given the Executor for his Care and Trouble; and afterwards the Court carried this Matter further, and in General held, that where a Legacy was given the Executor, he should be a Trustee of the *Residuum*. And the Foundation of that Opinion was, that giving him a particular Legacy, implied, that he was to have no more. The Case of *Farrington* and *Nightly*, in the Time of Lord *Macclesfield*, was to that general Purpose, and that is now the settled Opinion; however, several Distinctions have been endeavoured at to take Cases out of this general Rule on Account of the Nearness of Relation in the Executor to the Testator; and in such Cases it has been said, that the Executor shall not be a Trustee, but that Distinction has been over-ruled. It was denied in the Case of Lady *Glanvill* and the Dutches of *Beauford*; however, in the Case of

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of *Ball* and *Smith*, in the Time of Lord *Harcourt*, such Distinction did prevail in Favour of a Wife, where she was made Executrix; and his Lordship said he did believe, that in the Case of a Wife such Distinction has prevailed since. His Lordship said, he would now consider the particular Case that was before him; and that which he founded his Opinion upon was, That this was a Legacy given in Trust for the separate Use of the Wife, exclusive of her Husband, and as it was a Legacy of that Kind, no Inference can be made from thence, that she was not to have the Residue to her own Benefit; for tho' the Testatrix had intended that the Executrix should have the Whole; yet as she designed, that the Moiety of the Stock in Trade should be for the separate Use of the Executrix, exclusive of her Husband, there was a Necessity for vesting that Legacy in the particular Manner that it was done; and whenever that is the Case, no Conclusion can be drawn from an Executor's having a particular Legacy given him, that he was not designed to have the Benefit of the rest; and this Opinion falls directly within the Reason of the Case of *Griffith* and *Rogers*, and that of Lady *Glanvil* and the Dutches of *Beauford* before-mentioned. The last of these Cases came before Lord *Comper*, and that Decree was reversed in the House of Lords. An Objection indeed has been made, that barely giving a Legacy in Trust ought not to be a Foundation for such a Distinction; and so far indeed is true, that if this was barely a Legacy of that Sort, it ought not to make a Distinction; but this is not barely giving a Legacy in Trust, but a Trust of a particular Kind, and absolutely necessary to be made to answer the Purpose which the Testatrix intended; and so his Lordship was pleased to decree accordingly.

July 17.

Chamberlayn and Symonds.

THE Bill set forth, That in the Manor of *Kilpech* in the County of *Hereford*, there was a Custom to the following Effect; that the Tenants of that Manor have usually had Grants made to them of their Estates by Copy of Court-Roll, for the Term of ninety-nine Years, by the Words *Sibi & Suis*; that these Estates have usually descended to their Heirs; and that the Tenants have a Right to renew these Estates of the Lord from Time to Time, paying a Fine of two Years reserved Rent, or a Fine not exceeding two Years Value of the Land. The Bill charged, that the Plaintiffs were Tenants of this Manor under these Grants, that *Symonds*, the Defendant, was Lord of this Manor; thereupon the Bill was brought by the Tenants against *Symonds*, who was Tenant for Life of this Manor, and against his Son, who was Remainder-man in Tail, in order to have the Custom established. This was the Nature of the Bill, as it was now brought to Hearing under an Amendment. But as the Bill was originally drawn, the Custom was set forth to be, that the Tenants had this Right of Renewal, on paying a reasonable Fine. The Defendants, by their Answer, admitted, that by the Custom of the Manor the Estates did descend from the Tenants to their Heirs under a Grant by Copy of Court-Roll, made to them for the Term of ninety-nine Years, by the Words *Sibi & Suis*; but denied that the Tenants had any Right to compel the Lord to renew, and that such Renewal was merely voluntary. After the Answer was put in, *Symonds* delivered an Ejectment against such of the Tenants whose Leases had run out, and thereupon an Order was made, that Proceedings should be stayed in those Ejectments, upon those Tenants consenting to deliver Possession to *Symonds* at the Hearing of the Cause, in Case the Court should then be of Opinion, that the Plaintiffs had no Right to renew. This Cause coming now on to
Hearing,

Hearing, the Nature of the Evidence, on the Part of the Plaintiffs was to the following Effect. On the 30th of *December* in the 18th of *Car. 2.* at a Court holden for this Manor, the Jury prayed the Assent of the Lord to several Customs of a long Time used, enumerating them in particular, and amongst these Customs there was this to the following Effect. The customary Tenants necessarily shall have their Estates granted to them by Copy of Court-Roll for ninety-nine Years, and after the Expiration thereof, those Estates shall be renewed from Time to Time, paying to the Lord a Rent of two Years. To this Request of the Tenants, the Lord gave the following Answer; Some of the Customs are abrogated by Statute, some are dubious; but those Customs which have been observed Time out Mind shall be adhered to. This Part of the Evidence appeared to be entered on the Rolls of the Manor, and was the only written Evidence the Plaintiffs had to support the Custom in the Bill; but besides this there was the Evidence of three Witnesses, one of which swore, that he had heard the Tenants had a Right to have their Estates renewed; the second swore, that they had a Right to have them renewed on paying a reasonable Fine; and the third swore, that ——— The Evidence on the Part of the Defendants swore, that upon the Surrender of their Leases the Tenants had indeed frequent Renewals made of their Estates, but that the Fines on those Renewals were extremely various, and many of them exceeded the two Years antient Rent.

The *Attorney General* argued on the Part of the Plaintiffs, and to shew that this Custom has been established in a Manor adjoining to this, if not holden of it, he cited 2 *Chan. Rep.* 234.

Mr. *Willbraham* argued on the other Side, and to shew that the Plaintiffs had not made a Case strong enough even to have an Issue directed, he cited the Case of Lord *Abergavenny* and *Thomas*, determined by his Lordship.

Lord

Where
Chancery
will not di-
rect an Issue
to be tried by
Reason of the
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being doubt-
ful enough.

Lord Chancellor said, That his Opinion was, there was no Foundation in the present Case to direct such Issue, and that the Bill must be dismissed with Costs; he said in the Duke of *Grafton's* Case, the House of Lords were of Opinion, that no such Issue should be directed, and there the Evidence on the Part of the Tenants was stronger than here it is. As the Bill was at first brought, the Custom was laid to be, that the Tenants had a Right to have those Estates renewed on paying a reasonable Fine. But there can be no such Custom, it being uncertain what a reasonable Fine in such Cases is. In the Bill that is now brought to Hearing the Custom indeed is amended in this Respect, and laid to be, that the Tenants are intitled to such Renewal on paying a Fine of two Years antient Rent, or a Fine not exceeding two Years Value of the Land; however, tho' this Bill is thus amended, his Lordship said his Opinion was, that the Bill must be dismissed notwithstanding. That which gave Rise to this Bill was the Entry upon the Roll the 30th of *December* 18 *Car.* 2. But that Entry is by no Means strong enough to support the Case of the Plaintiffs. By that Entry the Jury do not present upon their Oaths what the Customs are, but only pray the Lord to assent to the Customs of a long Time used, enumerating them in particular, and amongst the rest the Custom relating to the present Matter. To this Request of the Jury the Lord gave a very reasonable and proper Answer; but the Consequence of that Answer is, that no Evidence at all arises in Favour of the Plaintiffs from the Entry. The only remaining Evidence offered for the Plaintiffs was, the Depositions of the three Witnesses; but not one of those Witnesses mentioned any one Instance of a Renewal of those Leases on the Payment of two Years antient Rent, or of a Fine not exceeding two Years Value of the Land. Those Witnesses merely spake to Hearsay and Belief; whereas a Custom must be supported by Instances of Fact. Nor have the Plaintiffs shewn any one Instance of a Renewal of those Leases merely on the Expiration of the Term. As
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these Observations arise on the Evidence given for the Plaintiffs, so the Evidence offered for the Defendant is absolutely inconsistent with the Custom of Renewal upon the Terms which the Plaintiffs pretend to; for those Instances manifestly shew, that various Fines have been received of the Tenants, at different Times, greatly exceeding the two Years Value of the antient Rent; and no Evidence offered to shew but they even exceed the Value of the two Years improved Rent. The only Matter remains with regard to those Tenants who entered into an Order by Consent, to deliver Possession in case the Court should be of Opinion, that there was no such Custom of Renewal as set forth in the Bill; and those Tenants must be directed to deliver up Possession. And so his Lordship was pleased to decree accordingly.

Berrysford and Millward.

July 18.

ON a Treaty of Marriage between *George Berrysford* and *Eleanor* his Wife, *Thomas Berrysford* his Father, and ----- the Father of *Eleanor*, had a Meeting together; at this Meeting *Millward*, who had a Mortgage upon the Estate of *Thomas Berrysford*, was accidentally present when the two Fathers began to discourse together upon this Subject, and talked of making a Settlement of that Estate upon which *Millward* had a Mortgage. *Millward* never mentioned to the Father of *Eleanor*, that he had such a Mortgage, but called *Thomas Berrysford* out, and reminded him of his having such a Mortgage upon his Estate. Upon this, as *Thomas Berrysford* swore, *Millward* consented privately with him, that he might settle this Estate, and that *Millward* would take the personal Security of *Thomas Berrysford* for the Payment of the Mortgage Money. Thereupon *Millward* and *Berrysford* returned into the Room, and an Agreement was enter'd into, in the Presence of *Millward*, between the two Parents, that this Estate should be settled upon *George Berrysford*, the intended Husband, for Life,

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Remainder

Where a Person shall lose the Benefit of a Mortgage, by reason of his being present at the Time a Settlement was made of the Estate, and his not disclosing it.

Remainder to *Eleanor* for Life, the Remainder to the first and other Sons of that Marriage in Tail, the Remainder to any other Sons that *George* should have of any other Wife, the Remainder to *Thomas* in Fee.

In Pursuance of this Treaty the Marriage took Effect in 1726; in 1738 *Millward* brought an Ejectment to recover the Possession of this Estate as Mortgagee; and thereupon the present Bill was brought by *George Berrysford* and *Eleanor* his Wife against *Millward* and against *Thomas Berrysford*, in order to have a perpetual Injunction.

To this Bill *Millward*, by his Answer, did admit his being accidentally present at this Meeting; he admitted likewise the Discourse being made in his Presence about settling this Estate, and his not discovering to the Father of *Eleanor*, that he had such a Mortgage upon it; and likewise he admitted his taking *Thomas Berrysford* out of the Room, and reminding him of his Mortgage; but seemed not to remember any thing about the Agreement between him and *Berrysford* to take his personal Security for the Money.

Thomas Berrysford the Defendant was examined as a Witness in this Cause on the Part of the Plaintiffs, and was examined as a Witness for *Millward*; and he swore, that *Millward* did agree with him to take his personal Security for the Money.

Where a Mortgagee has concealed his Mortgage, notwithstanding he was present at Time the Settlement was drawn, and by that Means lost

Lord Chancellor said, his Opinion was, That the Plaintiffs were well intitled to a perpetual Injunction, and ought to be relieved under the Head of Fraud. He said, the Case is well known, which was in this Court, where a perpetual Injunction of this Kind was granted by reason of a Mortgagee's Ingrossing a Settlement, and not discovering that he had such a Mortgage upon the Estate; and yet

the Benefit of his Mortgage against the Persons on whom the Estate was settled; where he shall have a Decree over for his Money against the Mortgagor.

yet the Mortgagee in that Case was an Infant at the Time he ingrossed the Deed. In the present Case it is sworn by *Thomas Berrysford* expressly, That *Millward* did agree to take his personal Security for the Money; and that certainly was the Fact. For these Reasons, his Lordship said he would declare, That *Millward* having voluntarily concealed his Mortgage at the Time of the Treaty of Marriage, he was not intitled to have any Benefit from it against the Plaintiff. He said he would declare farther, That he would make no Decree over for *Millward* against *Thomas Berrysford*, by reason that both Parties had examined him as a Witness in the Cause. He said he would direct, that *Millward* should assign the Mortgage in Trust, for the Benefit of the Plaintiffs and the Issue of that Marriage; but would not determine whether this Mortgage was to be considered fraudulent or not against the Issue which *George* might have by any other Wife, and would reserve the Consideration of that Matter. He said he would direct, that *Millward* should pay the Costs both in Law and Equity, and likewise the Costs of the Assignment; but would direct, that this should be without Prejudice to *Millward's* bringing any Bill against *Thomas Berrysford*. And so his Lordship was pleased to decree accordingly.

Harvey and Harvey.

Novemb. 12.

1739.

Edw. Harvey v. Michael Harvey & others
E*dward Harvey* being Tenant for Life, and *Michael* his eldest Son Remainder-man in Tail of certain Lands of the Value of 900 *l. per Annum*, in 1715 they thought proper to join in a Deed, on the Marriage of *Michael*, to the following Effect. As to Part of the Lands, it was agreed, that they should be for the Use of *Edward* for Life, the Remainder, as to the other Part, to *Michael* for Life, the Remainder in that Part which was to *Michael*, to the Wife for Life, the Remainder in the Whole to the first and every other Son of *Michael* in Tail. In this Settlement there was the following Power. “ Provided always, and it is
“ hereby

“ hereby agreed, by and between the respective Parties to
 “ this Deed, that if *Elizabeth*, the Wife of *Edward*, dies
 “ in the Life-time of *Edward*, and *Edward* marries any
 “ other Wife, that then and so often *Edward* may settle
 “ so much of the above-mentioned Premises as shall be
 “ of the yearly Value of 603 *l. per Annum* for a Jointure
 “ and Provision of such Wife, for and during her natural
 “ Life.”

Elizabeth died, and *Edward* intermarried with *Mary Cartwright*, and thereupon, by Deed of *May 1725*, previous to the Marriage, in Consideration of the intended Marriage, and of 2000 *l.* Fortune with the Wife, a Settlement was made of all the Lands comprised in the first Deed, to Trustees and their Heirs, to hold the same during the Life of his intended Wife, on Trust, out of the Rents and Profits, to raise 100 *l.* a Year for the separate Use of the Wife during the Coverture, and after the Decease of *Edward*, to raise 300 *l. per Annum* for the Benefit of the Wife during her Life, for a Jointure; and on this farther Trust, to permit and suffer the Owner of the Premises to receive the Residue of the Profits.

In *September* following, subsequent to the Marriage, another Deed was made by *Edward* of the same Premises, and to the same Trustees in like Manner, during the Life of *Mary*, to secure to her another Annuity of 300 *l. per Annum*.

In 1731 another Deed was made by *Edward*, reciting the several Deeds before-mentioned, whereby the same Premises were convey'd to the same Trustees, in Trust to raise 100 *l. per Annum* for the separate Use of the Wife during the Coverture; and after the Decease of *Edward*, to raise an Annuity of 600 *l. per Annum* for her during her Life, by way of Jointure. In this Deed there was a declaratory Clause, that the above recited Indenture was made to secure the said Sum of 100 *l.* during the Cover-
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ture, for her separate Maintenance; and after the Decease of *Edward*, to secure to her a Sum not exceeding 600 *l. per Annum*, according to the Power reserved to *Edward* by the Indenture of 1715. *Edward* died, *Mary* survived him, and thereupon she brought the present Bill against *Michael* and the Trustees, in order to have the Benefit of the Annuity of 600 *l. per Ann.* secured to her by the last mentioned Deed.

The *Attorney General* argued on the Part of the Plaintiff, and for Authority cited 2 *Vern.* 30. *Sandys* and *Dixwell* December last in this Court, *Hollingshead* and *Hollingshead* 14 June 7 *Ann.* *Orford* and *Orford* the 5th of December 1709. *Lady Clifford* and *Lord Clifford*, 2 *Vern.* 379. the Case of *Lord* and *Lady Coventry*, and that of the Earl of *Tankervill* and *Lord Wilmington*.

And Mr. *Hamilton* on the same Side cited the Case of *Cook* and *Arnold*.

Mr. *Noel* argued on the other Side, and cited the Case of *Hely* and *Bond* in *Abr. of Cases in Equity*, Title *Power*, and the Case of *Orby* and *Lord Mohun* in 2 *Vern.*

This Cause came on in the Paper on the 24th of *October* last. His Lordship at that Time directed it to stand for Judgment, and now he delivered his Opinion in it.

His Lordship said, there were two Matters proper for his Consideration; first, What was the true Construction of the Power reserved by the Deed of 1715; and, 2^{dly}, The several Acts done towards the Execution of it. With regard to the first of these Questions, 'tis very plain, that this is a Power in *Edward* to settle a Jointure upon any Wife that he should afterwards marry, and that he might make the Settlement *toties quoties*, as he should marry. The Power too is to settle and convey Lands; but then this Power is limited, and he could

Construction
of a Power.

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not settle all the Lands mention'd in the Deed; but only so much of them as amounted to 600 *l. per Ann.* By this Deed likewise the Lands ought to be settled for the natural Life of such Wife as he should marry. By this Power the Settlement, as has been said, must be of the Lands themselves, and that subject to natural Out-goings, as parochial Payments and Repairs, &c. With regard to the second Question, it is observable, that the first Settlement is made before Marriage, of Lands of the Value of 900 *l. per Ann.* and out of these Lands an Annuity is granted of 300 *l. per Annum.* The Deed of September is made for the raising another Annuity likewise of the same Value. And the last Deed includes both Annuities together, by granting one intire one of 600 *l. per Annum*; and in this Deed there is a declaratory Clause, that the above-mentioned Indentures, and this present Indenture were made to secure the Sum of 100 *l. per Ann.* for her separate Use, during the Coverture; and after the Decease of *Edward*, for securing one Annuity to her during her Life, not exceeding 600 *l. per Ann.* according to the Power reserv'd to *Edward* by the Deed of 1715. And his Lordship's Opinion was, that the Execution of the Power by the Deed of May 1725, was void both in Law and in Equity. He said he would first consider it in Point of Law; the Power is to settle so much of the Land as shall be of the Value of 600 *l. per Annum*, but by that Deed Lands of 900 *l. per Ann.* were settled. The Power is to settle Lands by Way of Jointure, and Provision for any such after taken Wife. Whereas this is not a Jointure, but a Conveyance to Trustees, in Trust for raising an Annuity. To make this a Jointure in Point of Law, the Lands should be to the Wife her self. By this Deed likewise an Annuity is to be raised of 300 *l. per Ann.* but nothing of this is mentioned in the Power. To consider this then in Equity, his Lordship's Opinion was, that this Deed was void in this Court likewise. He said he did not mean, that in Case the Wife should be unprovided for, this Court would not supply the Defect of this Conveyance; but it was so far void,

What a void Execution of it in Point of Law.

What a void Execution of it in Point of Equity.

What not a good Jointure by Reason of Lands not being settled by a Rent-Charge.

even in Equity, that the Wife could not have the specifick Thing which was granted by that Deed. Under the Deed of 1715 *Michael* was to have a clear Estate in the rest of the Premises over and above the 600 *l. per Ann.* whereas by the Deed of *May* 1725, an Annuity is granted chargeable upon the whole Estate. In respect of the Jointress this Deed could not be good. Neither she nor her Friends stipulated for an Annuity of 300 *l. per Ann.* and unless the Wife would otherwise be unprovided for, this Deed could by no Means be made Good. It has been rightly admitted by the Counsel for the Defendant, that the Court does relieve defective Conveyances in some Cases. It has been admitted by them, that it does so in Favour of Purchasers, Creditors, younger Children and Wives; and Wives and Children are in some Degree considered as Creditors by Nature. The Provision for a Wife is the present Case; but the Defendant's Counsel have insisted, that in Case of a Wife, there is this Limitation to the Rule, that she be a Wife unprovided for. For which Reason the Counsel have admitted, that the Plaintiff might be intitled to have the Defect of the first Deed supplied, but not the Defect of the others. But then the same Argument proves, that if the Wife cannot have the Benefit of the first Deed, she is to be considered as a Wife unprovided for. Suppose no Settlement had been made at all upon the Wife before Marriage; and then *Edward* had made a meer voluntary Execution of his Power for Lands of 600 *l. per Ann.* and that had been done defectively; no Doubt can be made but this Court would have supplied the Defect of that Conveyance; many Cases have been to this Purpose, that in 1 *Chan. Cas.* 264. is so; the same was that of *Tollet* and *Tollet*, and that of *Carter* and *Carter* the 20th of *June* 1730. 'Tis not to be doubted therefore, but if the Husband, even after Marriage, had executed his Power voluntarily in Favour of his Wife, and she was not otherways provided for, this Court would have supplied a Defect in the Conveyance; if so, the present Case is reduced to that, for the Reasons that have been mentioned. The

first

Where defective Execution of Power supplied in Equity.

Where defective Execution of a Power made good in Equity in Favour of a Wife, tho' the Deed made after Marriage.

Where a Wife said to be unprovided for.

Where Relief given in Case of defective Conveyances.

Where defective Conveyance aided in Case of a Wife unprovided for.

first Deed made before Marriage is not good; it was contrary to the Power in the very Substance of it, it being a Grant of an Annuity out of Lands of 900 *l.* a Year, instead of a Grant of Lands of 600 *l.* a Year; therefore if the Court should decree in Favour of that Deed, they must either decree something contrary to the Stipulation of the Parties, or what was not warranted by it; on this Foot the Wife is unprovided for. The Question then is, Whether she cannot have the Defect in the subsequent Settlement made good to her, tho' made after Marriage. In this Respect the present Case differs from all the Cases mentioned by the Counsel for the Defendant. The Case of *Bave* and *Mountague*, and that of *Sir Thomas Orby* and *Lord Mohun*, do not come up to the present one. This is a Case very much like those of supplying defective Conveyances, in Favour of a Wife and younger Children; and the general Rule seems to be, that in Case of a Wife and younger Children unprovided for, this Court will supply the Defect of the Conveyance. And there are many Cases where, Wives and younger Children having other Provision likewise, but not sufficiently provided for, this Court will assist them. Where a Copyhold is devised for the Benefit of a younger Child, and no Surrender made, tho' such Child has a Portion given it; yet if the Heir at Law has a reasonable Provision, this Court will supply the Defect of the Surrender. The Case of *Weeks* and *Earle* the 18th of Nov. 1717. before Lord *Comper*, was to that Purpose. Indeed as this is a Provision after Marriage, and after a first Settlement, if there had appeared any Imposition on the Husband, or improper Advantage taken of him by the Wife, these Circumstances might have had Weight. But nothing of this is pretended; and it is no Objection to say, that she brought but a Fortune of 2000 *l.* Value. And the Case of Lord and Lady *Coventry* does not come up to the present one, for there the Party did not execute his Power at all. His Lordship said it is very true, that he did not know, that Articles had been carried by this Court into Execution without a sufficient Consideration, where the Party

Where defective Conveyance made good in Favour of younger Children, tho' in some Measure otherwise provided for.

Where not carried into Execution in Equity without a sufficient Consideration, when the Party has not carried them into Execution himself.

Party has not carried them into Execution himself. To consider then the Operation that the declaratory Clause has in the present Case; that is a Clause whereby it appears, that it was the Party's Intention to reduce those incorrect Deeds, which had before been made, to some kind of Consistency. And this was a Clause which the Court might well lay hold of; for the Decree that he should make would be to refer it to the Master, to set out so much of the Lands comprised in the Settlement of 1715, as should be sufficient to make the Plaintiff a Jointure of Lands of 600 *l. per Annum*. And so his Lordship was pleased to decree accordingly. Vide *the subsequent Case*.

Harvey and Harvey.

July 22.

THIS Cause came now on again upon a Rehearing. And *Ante* 103. to shew that the former Decree was wrong, Mr. Noel cited the Case of *Scroop and Offeley* the 24th and 25th of March 1726, in the House of Lords, and 2 *Williams* 623.

The *Attorney General* argued on the other Side, and cited the Case of *Burton and Lloyd* before Lord King, Cook and Arnold the 21st of July 1734 before Lord Talbot, Andrews and Waller before the same Chancellor, and that of *Smith and Baker*, determined by his Lordship the 12th of July 1737.

Mr. Brown on the same Side cited *Salk.* 181.

Mr. Murray on the same Side cited the Case of *Watts and Bellows*, reported in *Williams*, and the Countess of Oxford's Case, cited in 1 *Chan. Ca.* 264.

Lord Chancellor said his Opinion was, That the Decree which has been made ought to stand. He said, when he delivered his Opinion before, he enter'd pretty much at large into the Arguments which were urged at the Bar, and

the Cases which were there cited ; for which Reason he would not repeat the Objections which were there made, but would rather confine himself to the principal Ground which has been offered for the present Rehearing, namely, that the Settlement in *May 1725* was an invalid one, at least in Equity, and therefore that there was no Reason for the Court to interfere to supply the Defects of that which was made in 1731. And his Lordship said, he took it to be clear, that the Deed of 1731 was such a one as must have been aided in this Court, were it not for the Deeds that were made prior to it. It has been said indeed, that though there were not any prior Deeds in the Case, the Defects of that Deed would not be aided, by reason that it was a Deed made after Marriage, and on that Account to be considered as a voluntary Provision for the Wife. But no Weight is to be laid on that Objection ; for in aiding defective Executions of Deeds in Favour of a Wife or Children, it has never been required, that those Deeds should be founded on any valuable Consideration in the strict Sense of the Word ; but the Deed's being in order to make a Provision for a Wife or Children has been thought to be sufficient. That was the Case of *Smith and Ashton* in 1 *Chan. Ca.* 264, that of *Fowler and Fowler*, and that of ----- and ----- ; and as this is the general Doctrine, so was it not for the prior Deeds, that have been in the present Case, it is one of the strongest that can come before this Court for Relief ; because, for want of a common Recovery to dock the Intail, under the original Settlement in 1679, the Plaintiff could have no Title at Law to have the Benefit of a Jointure, and by that Means was absolutely forced to come into this Court for Relief ; and where that is the Case, that the whole Estate, over which the Power is executed, is merely an equitable Estate, the being an absolute Voluntier is no Objection against the Party's having the Assistance of this Court to supply the Defect of a Deed ; for the Estate being merely an equitable Estate, obliges this Court to make a Determination concerning it. And where that is the Case, the Party's being a
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mere Voluntier is no Objection to the having a defective Execution of a Power supplied, which is exercised over such equitable Estate. The principal Objection therefore arises, in the present Case, from the prior Deeds that have been made, the second of which may be laid out of the Case; so that the Main of the Objection arises from the Deed of *May 1725*. It has been said, that by that Deed the Power which the Father reserved to himself under the Deed of *1715*, was compleatly executed, and therefore that this Court ought not to give any Assistance to the subsequent Deed in *1731*. But his Lordship's Opinion was, That the Power which the Father reserved to himself under the Deed of *1715*, was not compleatly executed, either in Law or Equity, by the Deed of *May 1725*. That it was not so in Point of Law has been admitted by the Counsel for the Defendant, and nothing can be clearer than that; for if a Power reserved over a legal Estate is executed defectively at first, such Power may be executed over again; and the last Execution of the Power shall stand, because the first is a mere Nullity; therefore the having executed an improper Deed cannot even at Law be said to be a compleat Execution of a Person's Power; and the Deed of *May 1725* can by no Means be good at Law on Account of many Objections that might be made. To consider then how that Deed stands in regard to Equity. It has been admitted, that a Person who has reserved to himself a Power of this Kind, is not bound to execute the Whole of this Power at once; he may execute it in Part by one Deed, and in Part by another. But though that has been admitted in general, yet to shew that this could not be done in the present Case, it has been said, that by a Clause in the Deed of *May 1725* the Father declares, That the Provision, which he thereby made for his Wife, was to be in Recompence for her Jointure, and in full Bar of her Dower; and therefore it has been urged, that that Clause amounts to a Release on the Part of the Father in Favour of his Son, that he would not make any other Settlement of this Estate in Favour of his Wife. But those
Words

Words are only the common Form inserted in Marriage Settlements ; and therefore from those Words there cannot be drawn an Inference of that Sort. But an Argument has been drawn from another Clause in this Deed, whereby it is directed, That after raising the Rent-charge of 300 *l.* *per Annum* for the Wife, the remaining Profits of the Estate shall be applied for the Benefit of the Remainderman. And it has been urged, that that is an express Clause, allotting the Profits over to another Purpose ; and therefore, that the Father cannot afterwards undo what by that Clause was done. But no Inference of this Sort can be drawn from that Clause neither ; the Inserting those Words is saying no more than what Law and Equity would have said without them. 'Tis not by this Clause said, That *Michael* the Son was to have any particular Benefit from this, and he was to have no more Benefit from it than the rest of the Remainder-men. An Objection of the same Kind has been made from the whole Estate of 900 *l.* a Year, over which the Power could be exercised, being vested in Trustees. But no Inference of this Kind can be drawn from that neither. The present Case has been compared to that of *Scroope* and *Offeley* in the House of Lords. But that Case differs *toto cælo* from the present one ; for there his Lordship said he well remembered, that the Covenant in the first Settlement was construed to be a Release of Part of the Power, which there is no just Reason to believe was intended to be done in the present Case. But then it has been said, That supposing the Deed of *May 1725* was not a compleat Execution of the Power reserved to the Father, yet it was such an Execution of it as would have been aided in Equity ; and from thence it has been inferred, that by that Deed the Wife was provided for ; and where a Wife is provided for, it has been said, that Equity will not aid a defective Execution of a Deed made in Favour of her. This, his Lordship said, was the strong Point of the Case, and he would consider it in two Lights ; First, By examining whether it was the Rule of the Court not to aid a defective Execution of a Deed in Favour of such a one.

And, 2^{dly}, Whether the present Case falls within that Rule. With Regard to the first of these Matters, his Opinion was, that the Rule which has been laid down, namely, that a Wife or Child, who comes to have a Benefit of a defective Execution of a Power, or a defective Provision for them, must be a Wife or Child totally unprovided for, was a wrong Rule. In Cases on this Subject it has been rightly said by the Court, that the Husband or Father are the proper Judges, whether the Wife or Child are sufficiently provided for, or not. In these Cases the Court will not examine, whether the Provision that has been made was a suitable Provision, or not; but will leave it to the Husband or Father to judge when they shall be sufficiently provided for. And was the Court to enter into an Inquiry of that Sort, the Court must examine into such Circumstances of Families which it would not be fit for them to do; and therefore in these Sort of Cases the Court has never entered into the Question, whether the Wife or Child was sufficiently provided for. If the Father or Husband has said, that they were not sufficiently provided for, and has considered them as such, the Court has considered them in the same Manner; but on the other Hand the Court has considered, whether a Wife or Child has been totally unprovided for, or left in such a Condition as is not fit for their State or Quality. On that Side indeed of the Question the Court has considered and has given Relief, where a sufficient Provision has not been made; but has never relieved by Reason of the Excess of it; and tho' it has been said, that no Case can be cited for that Purpose, yet the Countess of Oxford's Case cited in 1 *Chan. Cas.* 264. contradicts that Assertion. His Lordship said he had indeed directed, that that Decree should be search'd for, but the Decree could not be found; but supposing this was the Rule of the Court, namely, that they will not supply the defective Execution of a Deed in Favour of a Wife or Child that is provided for, his Lordship said, he would now consider, whether the present Case would fall within that Rule; and his Lordship's Opinion was, that it would

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not;

not ; and that will bring it to the Question, whether by the Deed of *May 1725*, the Wife could be said to be a Wife provided for according to the Intention of that Deed ; and his Lordship thought that she could not. In the first Place, by that Deed there was a plain Agreement of the Parties, that Mrs. *Harvey* was to have a Rent-charge of *300 l. per Ann.* charged on the whole Estate over which the Power extended. It has been admitted by the Defendant, that had she brought her Bill in order to have the Benefit of that Deed, the Court could not have decreed, that she should have such a Rent-charge ; for by the Deed of *1715* she was to have the Land it self, and not a Rent-charge out of it. Another Objection to that Deed is, that the whole *900 l. per Ann.* over which the Father had a Right to exercise his Power, so as that he did not Jointure his Wife in more than *600 l. per Ann.* was by the Deed of *May 1725.* vested in the Trustees ; the Consequence of that was, that the whole Estate was burdened with the Jointure, which was not according to the Intent of the Power reserved to the Father. It has been said, that this Defect in that Deed might have been made good by the Court's allotting Lands of the Value of *600 l. per Ann.* by Way of Security for this Rent-charge of *300 l. per Ann.* but that would not have been proper for the Court to have directed ; the Estate might have lain in the Fens, subject to Inundations, and then Lands of the yearly Value of *600 l. per Ann.* might not have been sufficient to have answered that Annuity. This shews that that would not have been a proper Method, with regard to the Wife, to have supplied the Defect of that Deed. And there is another Argument which shews, that that would not have been proper, namely, with regard to the Remainder-man, to have supplied the Defect of the Deed in that Manner ; and that arises from this, that was the Court to supply the Defect of that Deed in that Manner, the Arrears would fall upon the Remainder-man. Another Reason against Supplying the Defect of that Deed in that Manner would be, that in that Deed there is a

Clause

Claufe, that *Michael* the Son, and the reſt of the Remainder-men, ſhall retain the Poſſeſſion of the Eſtate themſelves till they ſhall make Default in Payment of the Rent-charge. *Michael* the firſt Remainder-man might be guilty of a Default of that Kind, and this might be an Inconvenience to the ſecond Remainder-man. His Lordſhip ſaid he by no Means mentioned this, to ſhew that the Court would not have ſupplied the Defect of that *Deed* at all, but to ſhew that the Court would not ſupply the Defect of it in that Manner. The Method which the Court would have taken, muſt have been by directing ſome Lands to be ſettled for the Jointure; and it might have been a Point, Whether, as the whole Eſtate of 900 *l. per Ann.* over which the Power extended, was by the Deed of May 1725 veſted in Truſtees, the Court would not have allotted 600 *l. per Ann.* Part of thoſe Lands, for ſuch Jointure. But his Lordſhip ſaid, that for the Reaſons which he had before given, the Plaintiff in the preſent Caſe was not to be conſidered as a Wife unprovided for; and as ſhe was not provided for in Point of Law or Equity, according to the Intent of that Deed, ſhe ought to be conſidered as a Wife unprovided for; and as that is the Caſe, the Queſtion is, Whether ſhe is not intitled to have the Aſſiſtance of the Court in aiding the Deed of 1731. To ſhew that ſhe is not, it has been ſaid, that this Deed is liable to more Objections than the Deed of May 1725, by Reaſon that by this Deed the Husband attempted to ſettle a Rent-charge of 600 *l. per Ann.* which greatly exceeded the Power which he had. And 'tis indeed true, that the Deed of 1731 is certainly defective in this Reſpect; and that is the Reaſon of the Plaintiff's coming into this Court, to have that Defect ſupplied. But when it is ſaid, that this Deed is liable to ſtronger Objections than the former, his Lordſhip differed in Opinion; for the Objection in Point of Law goes equally to the one Deed as to the other. It has been ſaid, that the Inſtances of this Court's Supplying Defects in Conveyances, are confined to thoſe Caſes where the Defects
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arise, only with regard to some legal Ceremonies, and not where there is an Excess in the Execution of the Power in Respect of the Value of the Thing intended to be conveyed. But the Rule of the Court is by no Means confined so narrowly as has been mentioned; and therefore where a Person has a Power to make Leases for twenty-one Years, and he makes a Lease for forty, that Lease is undoubtedly good for twenty-one Years. And the declaratory Clause, which is in the present Deed, is not to be laid out of the Case; the Purport of that Clause is this; And it is hereby declared, that the Rent-charge above-mentioned of 600 *l. per Ann.* shall be in full Satisfaction of her Jointure, according to the Power reserved by the Deed of 1715. The Parties by this Clause plainly shewed, that they were doubtful whether it could take Effect, or not. And this Clause seems to be put in as the Clause was in Serjeant Maynard's Will, *valeat quantum valere potest*. Suppose the Father had vested the whole Estate of 900 *l.* a Year in the Hands of the Trustees, for the Benefit of his Wife, by Way of Jointure, without mentioning any Rent-charge at all, and then had followed this Clause, *according to the Power to him reserved*; the Court in that Case would certainly have held the Power to have been well executed for 600 *l. per Ann.* Part of that Estate; and tho' the Party has mentioned, that it shall be by Way of Rent-charge of 600 *l. per Ann.* yet as the Court may make a Deduction out of that Sum for the Value of the Taxes and Repairs, 'tis the same as if 600 *l. per Ann.* had been settled. And 'tis a Strengthening to the present Case, that the Court would have supplied the Defect of this Execution of the Power in Case there had been no Deed but that of 1731. And as that is the Case, it would seem very extraordinary to the Reason of all People without Doors, that by the former Deed, which was made for the Wife's Benefit, she should be in a worse Condition than if no such Deed had been made. And so his Lordship was pleased to Decree according.

Price and Seys.

S. C. 2. Indr. M. K. 300.

July 24.

Richard Seys was indebted in his Life-time in 100 l. to his Daughter *Elizabeth*, for the Payment of which he gave her a Bond. After this he made his Will, and devised certain Lands, particularly describing them, to Trustees in the Words following; "That they, and the Survivor of them, shall and may, as soon as conveniently may be, to the best Advantage, according to their Discretion, sell and dispose of all the aforesaid Premises, for and towards the Payment of my Debts, particularly of three Mortgages, with their respective Interests; and for the full Discharge and Payment of the said Mortgage-Money and Interest aforesaid, and also for the Payment of all my other Debts, of what Kind soever, and of the several Portions and Legacies, and Sums of Money by me hereafter given, I do hereby give and devise all the rest of my Manors, Lordships, Lands, Tenements and Hereditaments whatsoever, free or customary, which said customary Lands I have surrendered to the Use of my Will, to my said Trustees, and their Heirs and Assigns as aforesaid, upon like Trust and Confidence, that they, and the Survivor or Survivors of them, as aforesaid, by and out of the Rents and Profits thereof, and the Fines which shall be raised by Leases to be made as herein afterward is appointed, shall, in Aid of my personal Estate raise such Sums of Money, as shall be sufficient to pay all the said Debts, Portions and Legacies as aforesaid, and that they do accordingly pay and discharge the same;" and after full Payment and Satisfaction thereof, he devised all his Lands, being of the Value of 1000 l. *per Ann.* to his Nephew *Evan Seys*, and to the Heirs of his Body, the Remainder to a Relation of his, *Richard Seys* and the Heirs of his Body, with other Remainders over; and by this Will bequeathed a Portion of 3000 l. to *Elizabeth* his

Where a Charge upon Land shall not be extinguished by its coming to the same Person that is intitled to the Land, by reason that the Party has not the same Interest in the Land as he had in the Charge upon it; when he has not the same Interest in both, there shall be no Extinguishment upon this Account.

See Ambl. 240.

600.2. Wils. 329.

1. Bro. Ch. C. 69.

H h

Daughter

Daughter before-mentioned, payable at her Age of Twenty-one.

The Testator died, and on his Death *Evan* enter'd into the Possession of the Premises by the Consent of the Trustees, and suffered a Recovery of them; but, by Mistake, Lands of 100 *l. per Annum* were not comprised in it.

In 1724 a Treaty of Marriage was had between *Evan* and *Elizabeth*, *Elizabeth* at that Time being but Eighteen Years of Age. Upon this Occasion Marriage Articles were enter'd into, and by those Articles, in Consideration of the intended Marriage, and of the 3000 *l.* Portion, which it was declared by the Articles would be, by the Will of old *Richard*, payable to her at her Age of Twenty-one; and likewise in Consideration of the 100 *l.* which was owing to her by the Bond of old *Richard*, *Evan* agreed to make a Settlement upon her of one Third Part of the Lands devised to him by the Will of old *Richard*, and that the Uses of that Settlement should be to *Evan* and *Elizabeth* for their Lives, and the Life of the Survivor of them, by way of Jointure upon her, and in Bar of her Dower, the Remainder to the Heirs of the Body of *Elizabeth* by *Evan* begotten, the Remainder to the right Heirs of *Evan* in Fee.

The Marriage took Effect soon after, but no Settlement was made in Pursuance of those Articles. However, *Evan* made his Will, and thereby devised to her for Life the whole Estate which was given him by the Will of old *Richard*; but that Devise to her was by the Will declared to be subject to the Payment of the Debts of old *Richard*, subject to the Payment of the Debts of *William* his Father, and subject to the Payment of the Debts contracted by himself; and after her Decease these Lands were devised to a Relation of his, one *Seys*, with other Remainders over. Of this Will *Elizabeth* was made Executrix.

In 1733 *Evan* the Testator died ; after his Death *Elizabeth* intermarried with *Lewis Price*, and thereupon a Bill was brought by *Lewis Price* and *Elizabeth* his Wife against *Richard Seys* the Younger, Devisee in Remainder by the Will of old *Richard*, in order to have the Will of *Evan* established, and the Trust of it carried into Execution ; and for that Purpose, that there might be a Sale of such Part of his Estate as should be necessary for the Payment of his Debts, there was likewise a Cross Bill brought by *Richard Seys* against *Lewis Price* and his Wife, in order that the Recovery suffer'd by *Evan*, her former Husband, might be set aside, by reason of its being suffered by one who was barely *Cestui que Trust*, and consequently no good Tenant to the *Præcipe*.

These two Causes came to be heard before Lord *Talbot* upon the 30th of *June* 1736, and upon that Occasion the Court declared, That the Recovery was well suffered notwithstanding that Objection ; and directed an Account to be taken of the Debts and Legacies that were owing, and that were to be paid under the Will of old *Richard*, and of the Debts that were owing from *Evan* and likewise from *William* his Father. This Account being taken before the Master, a Report was made, whereby the Master reported the Portion of 3000 *l.* given to *Elizabeth*, and the Bond for 100 *l.* given to her as out-standing Debts. To this Report Exceptions were now taken, and one of them was, That neither the Portion nor the Bond were to be considered as out-standing Debts, but that the same were sunk into the Estate for the Benefit of *Evan* the Devisee in the Will of the Testator. And thereupon a Bill was filed by *Evan* the Devisee against *Lewis Price* and his Wife, in order to have the Opinion of the Court touching this Matter.

And now the Exceptions in the former Cause, and likewise this present Cause, came on together to be heard.

Mr.

Mr. *Brown* argued as Counsel for *Evan Seys*, and for Authority cited the Case of the *Attorney General* and *Barkham* the 17th of *June* 1735, *Burford* and *Plush* the 14th of *March* 1738, and that of *Wilcocks* and *Wilcocks*.

And Mr. *Willbraham* on the same Side cited the Case of *Bloyfs* and *Lady Hereford* in 2 *Vern.* 501. and 4 *Rep.* 37.

On the other Side was cited 2 *Vern.* 338.

Where lands descended shall not be considered a Satisfaction for a Portion.

Where a Charge upon Land shall be extinguished by its coming to the same Person as is intitled to the Land.

Where a Sum of Money can be raised only by a Sale, and not by Rents and Profits.

Lord Chancellor said, That the general Question for his Consideration was, Whether the Portion of 3000*l.* and the Bond of 100*l.* were subsisting Demands, or whether they were in the Whole or in Part satisfied and extinguished? And his Lordship's Opinion was, That such a proportionable Part of those Demands was extinguished, as the Lands comprised in the Recovery bore to the Lands not comprised in it. It has been contended, that the Whole of these Demands were to be considered as satisfied, with regard to *Richard* the Younger. And to shew this it has been urged, That under the Will of old *Richard* these Demands were liable to be raised by the annual Rents and Profits in Succession, as they were received out of the Estate; and that *Evan* entering into Possession of that Estate, took it with this Burden upon it. It has been said, that the Trustees might have raised this Portion and the Bond-Debt of 100*l.* in this Manner, and that *Evan*, by entering upon the Estate, took it liable to have the Money raised in the same Method. But his Lordship said his Opinion was, That this Money was only liable to be raised by Sale of the Estate, and not by the Receipt of the annual Rents and Profits. For in the first Clause of the Will of old *Richard* certain of the Lands particularly described are devised to the Trustees for the Payment of Debts generally, and for the Payment of three Mortgages by Sale; and whenever, in a Devise, Lands are directed to be sold for a certain Purpose, though the Rents and Profits are ordered to be applied

plied to the same Purpose; yet unless there is an express Clause confining those Profits to annual Profits, the Money shall be raised only by Sale, and the Rents and Profits shall be applied in no other way than to keep down the Interest. So that with Regard to this Part of the Case, *Evan* having been in Possession, and received the Rents and Profits, is no Reason that upon that Account the Demands in Question should be considered as satisfied with Regard to *Richard* the Remainder-man. However, there is another Ground whereon it has been contended, that an Extinguishment of these Demands is made, and this is by *Evan's* marrying *Elizabeth*; and with Regard to this Part of the Case, *Elizabeth* is to be considered as having two Rights in her; the one in her own Right, inasmuch as she has survived her former Husband; the other in the Right of her former Husband, as being made the Representative of him. The State of the Case is in this Manner. Here is a Lady intitled to a Portion of 3000 *l.* payable at her Age of Twenty-one; and likewise intitled to a Bond; both of these are made chargeable by the Will of old *Richard* upon his real Estate. This Lady being about Eighteen Years of Age marries with *Evan*, who was intitled to the Estate, subject to these Demands, and some others, that were upon it. Before the Marriage *Evan* had suffered a Recovery, whereby he made himself Tenant in Fee of the Estate. There was indeed a Mistake in describing the Lands in the Recovery, so that all of them did not pass; but Lands of about the Value of 100 *l.* *per Annum* were not comprised in it. However, it is very possible, that at the Time of his Marriage Articles he thought himself Owner in Fee of the whole Estate. These Articles are declared to be in Consideration of the intended Marriage, of the Portion of 3000 *l.* which is said in the Articles will be payable to *Elizabeth* at her Age of Twenty-one, and likewise in Consideration of the Bond of 100 *l.* Upon these Motives it is, that he covenants to settle a Third Part of the Estate which he was intitled to under the Will of old *Richard*. The Uses are declared to be to himself and *Elizabeth*, and the Survivor of them, by way of Jointure

ture, and in Bar of her Dower, the Remainder to the Heirs of the Body of the Wife by him to be begotten, the Remainder to his own Right Heirs in Fee. After the Marriage had, the Wife attains her Age of Twenty-one in the Life of her Husband. The Marriage was in 1724, and the Husband died in 1733. He makes his Will, and thereby devises the whole Estate to his Wife for Life, and makes her his Executrix. A short Time after his Death *Elizabeth* intermarried with *Lewis Price*, and they two bring a Bill against *Richard Seys*, to have the Will of *Richard* established, and the Trusts of it carried into Execution, and, among other Things, to have a Sale. In that Cause it was a good deal insisted by *Price* and his Wife, that the Demands in Question were a subsisting Charge; but these Points being not determined by the Decree on the former Hearing, has given Rise to a Bill to be brought by *Evan Seys*, the Devisee of the former Husband of *Elizabeth*, in order to have the Opinion of the Court declared upon that Point. This is the State of the Fact. And with Regard to that Right of *Elizabeth*, wherein she insists, that she is intitled to the Demands in Question, as surviving her Husband, his Lordship said his Opinion was, that there was no Ground for it. In Point of Law it is extremely plain, that if a Man marries an Infant, and before the Marriage makes a Jointure upon her, such Jointure will bar her of her Dower. The Case cited by Mr. *Willbraham* out of the 4th Report 37. is express to that Purpose; and as it is clear in that Case, that the Wife would be barred of her Dower, so it is clear likewise, that if a Settlement had been made in the present Case instead of the Articles, this Court would not have suffered the Wife to claim the Benefit of the Demands in Question, notwithstanding she survived her late Husband; for the Husband *Evan* would have been considered as a Purchaser of her Portion. However, his Lordship declared, that he said this with some Distinctions; for if the Jointure was not adequate to her Portion, much more if there was any Collusion between her Friends and the Husband in the making of the Jointure; so that by that Means it was not suitable

Of what
Things a
Marriage
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shall be a
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to her Fortune, though at Law the Jointure in such Case would bar her of her Dower, yet as she would be intitled to the legal Interest in these Choses in Action by surviving her Husband, a Court of Equity in such Case would not take from her the Benefit of them; and in that Case she would have an Equity rebutting the Equity which the Representative of the Husband would have upon her. However, in the present Case it must be admitted, that here was no Settlement made, and only Articles to make one; and the Question is, Whether that will make any Difference or not? Now his Lordship's Opinion was, that it would not. Agreements to be performed are considered in this Court as performed; and Marriage Articles are considered so more strongly than any other Sort of Agreements. As this is so, it is reasonable that these Articles should bar the Wife of the Benefit of the Choses in Action in the same Manner as a Settlement it self would; and Equity in this Respect, as in many others, will follow the Rule of Law. And the present Case is agreeable to the Reasoning in the Case of *Boyse* and the Lady *Hereford*, which has been cited; nay, that was a stronger Case than the present one; for there, by the Marriage Agreement, no express Mention was made of the Portion, as here there is. It has been said indeed, that the Wife in the present Case does not claim under the Articles, but under the Will; however, that Circumstance makes no Kind of Difference. This Objection may be answered in two Lights. In the first Place, the Articles gave her one Third; and though the Words of the Devise give her the Whole, yet with Regard to that Third, which the Articles gave her, the Devise is void, and she does in Fact take that Third by the Articles. In the next Place, suppose she took the Whole under the Devise, yet as the Devise comes by way of Satisfaction of the Articles, she must have the same Disadvantages attending her under the Devise, as she would have had attending her under the Articles; and it would be a strange Thing to imagine, that the Devise of the Lands which he made to her should have any such Effect, as to
revive

revive in her a Right to the Demands in Question. The Will recites, That he had suffered the Recovery which has been mentioned; it gives the Estate to her, subject to the Debts of *Richard* the Uncle, of *William* the Father, and of his own Debts; which infers a Negative, that she was to have no other Benefit by the Will. His Lordship said, he would now consider the other Right, wherein *Elizabeth* claims to have the Benefit of these Demands, namely, as she is Executrix to her late Husband; and his Opinion was, That neither in this Light was she intitled to any Benefit of these Demands. By the Marriage the Husband became a Purchaser of those Incumbrances which were upon the Estate; and in Cases of this Kind, where a Person buys in Incumbrances which were upon his Estate, his Heir, whether he be the *Heres factus* or the *Heres natus*, is generally more favoured than the Executor. In the present Case, by the Will of old *Richard*, there was no Term for Years vested in the Trustees for the raising the Portion and the Money due upon the Bond; but the Estate was devised to the Trustees, subject in the first Place to these and some other Purposes, and then it was given to *Evan* in Tail. *Evan* suffered a Recovery; and as to so much of the Lands as were comprised in that Recovery, he thereby became the absolute Owner of the Estate. Under the Articles he became absolute Owner of the Portion and the Bond. To what Purpose would it have been for him to have kept these Demands subsisting? Should they be considered as subsisting, he must be Creditor and Debtor both during his Life-time; the Land and the Demands upon it were certainly then united. And what Ground is there to say, that by his Death there should become a Severance? To shew that there should be such a Severance there has been indeed the Case cited of *Thomas* and *Kemish*; but it is very different from the present one. That Case depends upon a particular Reason, namely, that the Person, who was intitled to the Land and the Money too, was an Infant, and died before her Age of Twenty-one; but she was of such an Age, as, had the Money been raised, she might have disposed

of that by Will, though she could not dispose of the Land; so that she was not exactly in the same State and Condition with regard to both those Kind of Estates. But his Lordship said he knew no Case, where a Person was of full Age, and had in all Respects the same Kind of Interest in the Land, and the Charge upon the Land too, that the Charge should be considered as subsisting. For these Reasons his Lordship said, that with regard to such Part of the Lands as were comprised in the Recovery, *Elizabeth*, tho' she is Executrix, can have no Remedy to come against those Lands to have any Part of the Demands in Question raised upon them. However, 'tis another Question, whether as Executrix she cannot have some Remedy against the Lands not comprised in the Recovery, and of which her late Husband continued Tenant in Tail. And as to that his Lordship's Opinion was, that she might have some Remedy against them. For as to those Lands, the Reason he had before gone upon ceases. The Party had not the same Kind of Interest in the Land, and in the Charge upon it. He had a limited Interest in the Land, and an absolute Interest in the Charge upon it. And the present Case in this Respect is like that of *Saville* and *Saville*, determined by Lord *Macclesfield*. The Question there was, whether Land in Tail should be considered as a Satisfaction for a Portion; and the Court was of Opinion, that it should not. They went upon this Reason, that the Party had not the same Interest in both; and the Case of *Thomas* and *Kemish* before-mentioned falls in with the Reasoning of this Part of the Case; to the like Purpose was the Case of *Cobwell* and *Shedwell*. The only Question remaining is, how the Charge is to be proportioned; as to that his Lordship's Opinion was, that *Elizabeth* will be intitled to raise, upon the Lands omitted in the Recovery, no greater Part of the Charge than according to the Proportion that the Lands omitted in the Recovery bore to the Lands comprised in it. And so his Lordship was pleased to decree accordingly.

K k

Carter

July 25.

Carter and Lord Colrain.

IN 1706, *Hugh Hare* entered into two Bonds to two of his Daughters, for the Payment of 100 *l.* each by Way of Satisfaction for the Share which they might be intitled to in their Mother's Jewels. In the same Year *Hugh Hare* died, leaving a Will, whereby he devised a Copyhold Estate of his to be sold for Payment of his Debts. By this Will he made his Children residuary Legatees, and appointed his Father, the Lord *Colrain*, together with *Mills*, to be his Executors. On the Death of *Hugh Hare*, the Lord *Colrain* was the principal acting Executor; but he delivered no Inventory of *Hare's* Estate. However, in a Year or Two after his Death, the Lord *Colrain* himself died, leaving his Wife, the Lady *Colrain*, his Executrix; and thereupon, in 1709, the Lady *Colrain* and *Mills* came to an Account together touching the Estate of *Hare*; and that Account was ballanced between them. This Account was made up by Books kept by the late Lord *Colrain*. By the *Items* of the Account in this Book, it appeared that several of them related to Payments made by the late Lord *Colrain*, for Maintenance Money paid to the Children of *Hare*, and for other Matters arising since *Hare's* Death. Nor did it expressly appear on the Face of the Account, that any one of the Sums were for Debts owing by *Hare*. However, in this Account there was a Sum of 35 *s.* for the Expences of *Mills*, which he was at in the Exchequer-Offices relating to some Tallies belonging to *Hare*.

In 1717 the Two Children of *Hare*, to whom the two Bonds before-mentioned were given, made an Assignment of them to Lady *Colrain* for a valuable Consideration.

In 1731 Lady *Colrain* died, and made *Carter* her Executor. Thereupon he brought his Bill against the present Lord *Colrain*, to whom the real Estate of *Hare* descended, setting

setting forth, that the personal Estate of *Hare* was not sufficient to pay these Bonds, and pray'd in Consequence of that, that the same might be paid out of that Part of the real Estate of *Hare* which descended to him.

In 1738 the Cause came to be heard, and a Decree was made, that in the first Place an Account should be taken of the personal Estate of *Hare*, that the same should be applied in a Course of Administration; and in Case that Estate should be deficient, that the Plaintiff should have a Satisfaction for the Bonds out of the real Estate descended from *Hare* to the present Lord *Colrain*. This Account coming to be taken before the Master, the Defendant brought in a Charge of the personal Estate of *Hare*, taken out of the Book wherein the Account before-mentioned was signed between the Lady *Colrain* and *Mills*. However he insisted, that the whole of the Book was not thereby made Evidence for the Plaintiff, and farther contended, that at least he was not bound to allow of the particular *Items* set forth in that Account. But the Master was of a contrary Opinion, and that the Balance of the Account was conclusive upon him, and reported the same accordingly. To this Report of the Master Exceptions were now taken, and the Principal one was, that none of the *Items* of the discharging Part of the Account ought to be allowed.

The *Attorney General* argued in Support of the Exception; and said, that he should not contend but in general, where the *Items* of a Book are produced by one of the Parties by Way of Charge upon the other, the rest of the Book becomes Evidence against him by Way of Discharge, but submitted it, that the present Case was distinguishable out of that Rule, by Reason that no Inventory of the Estate of *Hare* was taken by his Executors, and therefore that the Defendant had a Right to charge the Plaintiff out of this Book in the Place of an Inventory, and that upon that Account the Plaintiff should not be allowed to give Evidence for himself out of the Discharge of it;

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at least he submitted it, that the Defendant would be at Liberty to dispute all the *Items* in the discharging Part of that Account, by shewing, that upon the Face of it they cannot relate to Debts contracted by *Hare*, and that if they do not, the Defendant will not be liable. For he is to stand in the Place of the Creditors of *Hare*; the personal Estate being directed to be applied in a Course of Administration in the first Place, so that if these Payments in the discharging Part of the Account are for Maintenance of the Children, or otherways voluntary, for them, who were residuary Legatees, the Defendant may object and say, that those Payments ought not to be allowed in as much as there are Debts standing out, even Debts insisted on, on the Part of the Plaintiff.

Mr. Cox argued on the same Side, and to shew that the discharging Part of this Account could not even be read as Evidence for the Plaintiff, he cited *Abr. of Cases in Equity* 10.

Where a Book of Account being read as Evidence by one Side by Way of Charge, may be read as Evidence by the other Side by Way of Discharge.

Lord Chancellor said his Opinion was, in as much as the Defendant read that Part of the Book for him wherein was contained the charging Part of the Account, that the Plaintiff was intitled to read the discharging Part of it as Evidence for himself. And this is the general Rule of the Court, that where a Paper is produced by one of the Parties from which he takes his Charge, the same Paper may be read by the other Party by Way of Discharge. From this general Rule the Counsel for the Defendant have endeavoured to distinguish the present Case, by Reason that here the Executors of *Hare* omitted the Delivering in an Inventory, and that by that Means the Defendant is deprived of making such Charge upon the Plaintiff, as otherways he might. And therefore it has been said, that the Defendant shall be at Liberty to take his Charge from the Book of Accounts kept by one of the Defendants; and that he may do this in the Place of the Inventory. But his Lordship said, that he did not think the omitting to deliver in

The Consequence of an Executor neglecting to deliver in an Inventory.

in an Inventory was such a Misbehaviour, as would intitle the Defendant to have his Case distinguished from the ordinary Rule, that has been mentioned; and his Opinion was, that in the present Case the Discharging Part of the Account would be Evidence for the Plaintiff, with Regard to the Fact of Payment mentioned in the several *Items* of that Part of the Account. But notwithstanding this, his Lordship's Opinion was, That the Defendant was quite at Liberty to object to the particular *Items* in that Part of the Account, by shewing, that those *Items* ought not, in the Nature of them, to be allowed to exhaust the personal Estate of *Hare* as against him. With Regard to this Part of the Case the Fact is this. The Plaintiff makes his Demand against the Defendant, as he is the Executor of Lady *Colrain*; Lady *Colrain* was Assignee of two Bonds from two of the Daughters of *Hare*, which *Hare* had given them by way of Satisfaction for their Share in their Mother's Jewels. The Bond was enter'd into by *Hare* to them in 1706, and he died in the same Year. The Bonds were assigned to Lady *Colrain* in 1717. The Plaintiff brings this Bill to have a Satisfaction for these Bonds out of the real Assets of *Hare* descended to the Defendant. However, the real Estate is not to be liable but in Default of the personal; the personal Estate is therefore to be accounted for. On the Death of the late Lord *Colrain*, an Account was made up relating to this personal Estate between the Lady *Colrain*, who was his Executor, and *Mills* the surviving Executor of *Hare*. This Account was made up in 1709. And the Question is, How far the *Items* in that Account, contained in the Book kept by the Lord *Colrain*, shall be binding upon the Defendant; and that Question is reduced to this; How far those *Items* would be binding upon the Creditors of *Hare*, or those that stand in their Place. And his Lordship's Opinion was, that those *Items* ought not to be allowed as against them, and the Defendant is a Person standing in the Place of the Creditors. The Decree directs, "That an Account shall be taken of the personal Estate of *Hare*, and that it shall be applied in a Course of Administration."

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“ministration.” The Meaning of these Words is, That the personal Assets shall be distributed in the first Place for the Payment of *Hare's* Debts, and that according to their Priority. The Defendant therefore is intitled to see that those Assets be rightly distributed, and that the Children, who are the residuary Legatees, do not run away with them to the Prejudice of those Creditors; and upon looking into this Account it appears, that the *Items* do in every Instance, except in Relation to the 35 s. paid by *Mills*, relate to Payments made to those Children, and those Payments might be to them merely as they were residuary Legatees. It is manifest, that some of the *Items* relate to Payment for Things after the Death of *Hare*; and when some appear to be of that Kind, his Lordship said he would not presume that the others were not of the same Kind, and he would not make a Distinction, where the Parties themselves do not appear to have made any. For these Reasons his Lordship said, that he would disallow of all the *Items* in the Account as against the Defendant, except the *Item* of 35 s. And so his Lordship was pleased to order accordingly.

Adlington and Cann.

How far the Court will require a Discovery of secret superstitious Uses not reduced into Writing.

THE Bill set forth, That on the 1st of *August* 1738 *Laurence Hollester* made his Will, and thereby devised a House in *Bristol* to a Friend of his *William Cann* and his Heirs; that he likewise devised to *William Cann* and a Kinswoman of his *Mary Andrews* and their Heirs all the Residue of his real Estate. He likewise gave them all his personal Estate, excepting a Legacy of 20 Guineas which he gave his Daughter ----- the Wife of ----- *Adlington* for Mourning. The Bill charged, That this Devise was made to *William Cann* and *Mary Andrews* for Charitable Purposes; and that there was some secret or personal Trust, or some other Declaration of Trust for that Purpose not in Writing. The Bill charged, That the Testator died soon after

after the making this Will, and that *Cann* and *Andrews* had begun a Building for an Hospital with the Testator's Estate; and thereupon the present Bill was brought by ----- the Wife of ----- *Adlington*, the Daughter and Heir of the Testator, against *Cann* and *Andrews*, to have a Discovery of this Trust, and to have the Will set aside, as being contrary to the Statute of the 9th of the present King.

To so much of this Bill as sought a Discovery of any secret Trust relating to this Will, or any personal Trust, or any other Declaration of Trust not in Writing, and as to the Discovery of any such Trust, and the particular Relief pray'd by the Bill, or any other Relief whatsoever, the Defendants pleaded in Bar, That the Testator did make such Devise to them as in the Bill is set forth; and by that Will the Testator declared, "That the same was in Consideration of meritorious Services which he had received from them"; and that, if any such Trust there was, that the same was void by 29 *Car. 2.* by reason of its not being reduced into Writing. And by way of Answer they set forth, That there was found amongst the Testator's Writings, after his Death, a Paper to the following Effect. The Title of it was, "Rules and Requests touching a certain Will, dated the 2d of *August* 1738." By this Paper he took Notice of the Charitable Disposition in *Cann*, and referred himself to another Paper; but as it was sworn by the Answer, no such Paper could be found, this Plea was now set down to be argued.

Mr. *Clark* argued as Counsel for the Defendants, and for Authority cited the Case of the *King* and *Lady Portington* in *Salk.* 162.

And Mr. *Murray* on the same Side cited the Case of *Brown* and *Selwyn*, a few Years ago, in the House of Lords.

Lord

Lord Chancellor said his Opinion was, That the Plea ought to stand for an Answer, with Liberty to except at the Hearing of the Cause. Was this Plea absolutely to be allowed, it might be a Means of evading the Intent of the Statute made in the 9th of his present Majesty. In the present Case his Lordship said, that there were two Matters proper for his Consideration; the one the Merits of the Cause, namely, How far this Will and Paper-writing will be good notwithstanding the late Act of Parliament; and in the next Place the Extent of the Plea, as it is pleaded in the present Case. With Regard to the Merits of the Cause, the Plea sets forth, That the Testator devised a House of his in *Bristol* to *William Cann* and his Heirs, and that he devised the Residue of his real Estate to the same *William Cann* and *Mary Andrews*. The Testator declares indeed the Consideration of this to be meritorious Services, that he had received from them; but it is an easy Thing to insert a Consideration of that Sort. By the Answer the Paper-writing is admitted, though that Paper-writing is mentioned in no Part of the Plea; the Title of it is, "Rules and Requests touching a certain Will, dated the 2d of *August* 1738." The Date of the Will is here mistaken in one Day, for the Will was made the 1st of *August*; however it plainly relates to the Will in Question. The Paper-writing mentions the Charitable Disposition in *Cann*, and refers it self to another Paper; but it is sworn by the Answer, that no such Paper could be found. Thus the Matter stands on the Will and the Paper-writing. And on the Hearing of the Cause it may be a material Question, Whether this Devise will not be void by the Statute that has been mentioned? With Regard to the second Question, namely, the Extent of the Plea, it not only goes in Bar of any Discovery, and to the particular Relief prayed by the Bill, but in Bar of any other Relief touching the real Estate. His Lordship said, if he was to allow this Plea, and the Plea was to be replied to and proved, the Hands of the

How far the
Hands of the
Court are
closed by
the allow-
ing of a Plea,

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provided the Plea be replied to, and proved.

the Court would be closed ; but this in the present Case ought not to be. It has been said, that the Devise is absolutely to *Cann* and *Andrews*, and that no Charitable Purpose appears in Writing. For which Reason it has been contended, that the Statute of Frauds and Perjuries would be a Bar to the giving of any Relief in Favour of the supposed Charity, though the Statute of the 9th of the present King had never been made. It has been said, That was an Information to be brought for the Charity in the Name of the *Attorney General*, the Defendants would not be bound to discover it ; and for the same Reason it has been urged, that on a Bill brought by the Heir at Law a Discovery of this Sort cannot be had. His Lordship said he was not clear how far the Statute of Frauds may have an Effect upon the present Case, it being a Matter, as the Plaintiff contends, relating to a Charity. In Cases, where Lands have been devised to secret superstitious Uses, the Court of Exchequer has gone a great way in requiring a Discovery of them. They have done this in other Cases besides that cited out of *Salk*. And there it appears, that the Opinion of the Court of Exchequer differed from that of the King's Bench. His Lordship said he would now consider the Statute of the 9th of the present King. The Words of that Statute are, " No Manors, Lands, Tenements, Rents, Advowsons or other Hereditaments, Corporeal or Incorporeal whatsoever, nor any Sum or Sums of Money, Goods, Chattels, Stocks in the publick Funds, Securities for Money, or any other personal Estate whatsoever, to be laid out or disposed of in the Purchase of any Lands, Tenements or Hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any Person or Persons, Bodies Politick or Corporate, or otherwise, for any Estate or Interest whatsoever, or any ways charged or incumbered by any Person or Persons whatsoever in Trust or for the Benefit of any charitable Uses whatsoever ; unless such Gift, Conveyance, Appointment or Settlement of any

Where a Plea in Chancery shall be said to extend too far.

How far a Charity may be established, though not in Writing according to the Statute of Frauds.

Construction upon 9 G. 2. relating to Charities.

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“ such Lands, Tenements or Hereditaments, Sum or Sums
“ of Money or personal Estate, other than Stocks in the
“ publick Funds, be and be made by Deed indented, seal-
“ ed and delivered in the Presence of two or more credi-
“ ble Witnesses twelve Calendar Months at least before the
“ Death of such Donor or Grantor, including the Days of
“ the Execution and Death, and be inrolled in his Majesty’s
“ High Court of Chancery within six Calendar Months
“ next after the Execution thereof.” So that the Direction
of this Clause is, “ That no Lands shall be devised in Trust
“ or for the Benefit of any Charitable Uses whatsoever.”
And it may deserve Consideration, whether Trusts by Pa-
rol are not within the Meaning of this Clause of the
Statute, as well as Trusts in Writing. Another Observa-
tion that may be made upon the Extent of this Plea is,
that it goes in Bar to a Discovery of any secret Trust, or
any personal Trust, or any other Declaration in Trust not
in Writing. And it is not clear whether these Words do
not extend even to go in Bar of a Discovery of any secret
Trust whatsoever, whether in Writing or not. These Que-
stions are Matters of Difficulty, and will well deserve to
be considered at the Hearing of the Cause. The Court
has made very liberal Constructions in Favour of Charities
before the late Act of Parliament, notwithstanding they
have not been reduced into Writing. In Cases of personal
Estates there have been a great many Instances where Lega-
cies have been given by Will, and the Charitable Purposes
of those Legacies not declared in Writing; yet when there
has been an Inception to apply them for those Purposes,
the Court has decreed them so accordingly. But the late
Statute has declared, that these Sort of Gifts are against the
common Utility, and therefore it will deserve to be con-
sidered, whether now all Kind of Trusts in Land, given by
Will for Charitable Purposes, are not restrained. For these
Reasons his Lordship’s Opinion was, That the Direction
which has been mentioned ought to be given. And so his
Lordship was pleased to order accordingly.

Lord Vane and Lady Vane.

July 30.

IN 1735 Lord *Vane* married with his Lady; and on that Occasion, in Consideration of a Fortune of 6000 *l.* Lord *Vane* made a Settlement upon her of a Rent-charge of 1500 *l. per Ann.* by way of Jointure, and of a Rent-charge of 400 *l. per Ann.* for her separate Use during the Coverture. Soon after the Marriage was had Misunderstandings arose between them, and she left him; but in *March* in that same Year they came to an Agreement together, that in Consideration that she would relinquish her Right in a House in *Grosvenor-square*, her Rent-charge of 400 *l. per Ann.* should be increased to 700 *l.* And thereupon she lived with him again. After this they went into *France*; but there he beat her in a violent Manner, and upon this she returned into *England*, and swore the Peace against him. She likewise instituted a Suit against him in the Ecclesiastical Court to have a Divorce from him *Causa sevitie*. After that Suit had proceeded some Time, they came to an Agreement to the following Effect; “ That in Consideration of
“ her staying Proceedings against him in that Suit, and that
“ she would cohabit with him again in the same Manner
“ as by that Deed was declared, the Rent-charge of
“ 700 *l. per Ann.* should be waved, and in the Room of
“ it she should have one of 500 *l. per Ann.*” But in this Deed there was a *Proviso*, That if Lady *Vane* shall signify her Desire in Writing, to *John Aderly* her Trustee, to live separately from her Husband, then and in such Case she shall have free Liberty to do so. And Lord *Vane* covenanted that he would bring no Action upon any Account against any Person with whom she should cohabit, till by the like Notice to the same *John Aderly* she should signify her Consent to live with Lord *Vane* again. Lord *Vane* gave a Bond in the Penalty of 20000 *l.* for performing the Covenants of this Deed. By this Deed there
was

was a Day fixed upon for their Meeting in order to cohabit together again ; and they took Lodgings for that Purpose. But on that same Day, after they had been a few Hours together, a Quarrel arose between them, and he took a hot Poker out of the Fire, run it at her, and burnt her Clothes ; upon this she instantly went out of the House and left him again, refusing to cohabit with him for ever after. During the Time of this Separation she contracted some Debts, and on her former Separation she had done the same ; which Sums, together with Monies that Lord *Vane* owed her, amounted from the Time of her Marriage to 1700*l*. The present Bill was brought by Lord *Vane* against Lady *Vane* and her Trustees, in order to be relieved against these several Deeds, and to have an Injunction to stay the Defendants from commencing any Remedy upon them.

To this Bill the Answer of Lady *Vane* came in, whereby the Fact was stated to the Effect before-mentioned. And thereupon Mr. *Robinson* moved for an Injunction to stay the Commencing of any Remedy at Law on these Deeds, by Lady *Vane*, or her Trustees.

How far a Court of Equity will allow of Agreements for a separate Maintenance.

Where a Court of Equity will direct, that a separate Maintenance shall be stopped, by Reason that the Wife absents her self from her Husband.

Lord Chancellor said, that most of these Sort of Cases are very difficult to give a Determination upon. This Court has given Countenance to Agreements for separate Maintenances. And he did not know, whether in that Matter they had not gone too far. However the Court has generally been cautious to prevent an improper Use from being made of them. And therefore where Agreements have been made for Pin-Money, or separate Maintenance, if the Wife refuses to live with her Husband without having a sufficient Reason for doing so, the Court always refuses to aid her in the Recovery of such Maintenance, and in some Cases has even stopp'd it. And the Occasion of the present Bill has chiefly arose from the Covenant in the Deed of 1737, whereby Lady *Vane* was to have Liberty of

of leaving her Husband when she should think proper, and no Action was to be brought on any Account whatsoever against the Person with whom she should cohabit. And his Lordship said this was a shameful Clause, and a manifest Imposition upon the Husband. The Consideration of this Deed was her staying Proceedings against him in the Ecclesiastical Court, and her agreeing to cohabit with him. But was this Covenant to prevail, it would defeat that Part of the Consideration relating to her cohabiting with him; and besides by this Covenant the Husband is made to agree, that he will not bring any Action whatsoever on any Account against any Person whom she shall cohabit with. His Lordship said, that this Covenant in the Deed was a Fraud apparent upon the Face of it. By this Covenant the Wife has not only her Liberty to live separately from her Husband, but her whole Conduct is without Remedy. Should this Clause prevail, a Husband is to give up his whole Authority over his Wife. 'Tis indeed true, that as it is sworn by the Answer, (and the Answer in the present Case must be taken to be true) the Husband made a violent Attempt upon his Wife, by running a hot Poker at her. And that was a brutal Act indeed. However that will not shew but the Husband is intitled to some Relief in the present Case; and the Question will be, how far he is intitled to have it. The Bill prays to be relieved against all the Deeds. And did it appear by the Answer, that Lady *Vane* lived separately from her Husband without a Cause, his Lordship said he would grant an Injunction to stay her from commencing Proceedings at Law, upon every one of them. For nothing can be more mischievous to the Rights of Marriage than to support these Sort of Provisions for Pin-Money or separate Maintenance, where a Wife will take Advantage of that, and live separately from her Husband without any Reason. But that indeed does not appear to be the present Case. The Attempt that was offered upon her Life was a Foundation for her with-drawing herself from him. However his Lordship said, that with regard to some of the Deeds the

Where a Clause in a Deed made in Favour of a Wife shall be set aside as fraudulent upon the Husband. Where there is a Clause in a Deed giving a Wife Liberty to live separately from her Husband, and agreeing that no Action shall be brought upon any Account against the Person with whom she shall cohabit, where such Deed shall be set aside as fraudulent.

Injunction must be continued notwithstanding. It must be continued as to the Annuity of 700*l. per Annum*, granted by the Deed of *March* 1735; for though that Deed has not been carried into Execution by Reason that Lady *Vane* has not yet resigned up her Right in the House in *Grosvenor-square*, yet she may do that whenever she has a Mind to it; and then may proceed at Law for the Recovery of that Annuity. But the Circumstances of the present Case are sufficient to warrant the Court in granting an Injunction as to that. The Injunction must likewise extend to the Deed of 1737, whereby the former Annuity was given up, and in the Room of it an Annuity of 500*l. per Annum* accepted of. The Injunction must extend to that by Reason of the Covenant in that Deed, which has been mentioned, and in Consequence of this it must extend likewise to the Bond. However his Lordship's Opinion was, that the Injunction ought not to extend to the 400*l. per Ann.* granted by the Marriage-Settlement. There was a Cause for her going away, as he had observed before. And on that Account she must be at Liberty to proceed at Law upon that Deed. However his Lordship said, that still it will be a Question, how far she will be intitled to take her Remedy, even upon that Deed; Lord *Vane* must be indemnified from the personal Debts of his Wife. It is admitted that those Debts, together with the Money which he paid her, amount to 1700*l.* an Account must therefore be taken of what is due to her under that Deed; and she must be at Liberty to proceed at Law for the Balance. And Liberty likewise must be given her to apply to the Court in Case Default should be made in any future Payments. And so his Lordship was pleased to order accordingly.

*Edwards and Wife.**August 1.*

SIR *Francis Edwards* made his Will, and thereby recommended his Lady to take Care of *Hester* his only Daughter, but did not appoint her Testamentary Guardian. On the Death of Sir *Francis*, *Hester* became intitled to an Estate-Tail in Lands of the Value of 600 *l. per Ann.* with a Remainder to Lady *Edwards* in Fee. After the Death of Sir *Francis*, Lady *Edwards* intermarried with *Thomas Wise*, an *Irish* Gentleman of 1800 *l. per Annum* in that Kingdom. Soon after his Marriage he carried over his Lady with him with an Intention to reside there, and *Hester* went with them likewise. *Hester* was at that Time about twelve Years of Age. *Wise* was a Papist, but his Lady and Daughter were Protestants. This occasion'd a Bill to be brought in the Name of the Infant against *Wise* and his Lady, praying, That the Infant might be removed from the Custody of her Mother, and that she might be placed under the Custody of her Grandmother *Jane*, who had intermarried with ----- *Jenks*.

To this Bill *Wise* set forth by his Answer, That *Jenks* the Husband was a Person in Debt, and that he had a Design of marrying the Infant to a Son of Sir *Henry Edwards*.

A Petition was now preferred, praying, That the Infant might be removed from the Custody of her Mother, and that her Guardianship might be committed to *Jane Jenks* her Grandmother.

Lord Chancellor said he was clearly of Opinion, that the Infant ought not to continue under the Custody of her Mother. The Mother has not such a Right to the Guardianship in the present Case, but that this Court may certainly control it; she is not Testamentary Guardian. Her only Pretence for the Custody of the Infant can be either

Where a Court of Chancery has a Right to dispose of a Guardianship.

Whom a Court of Chancery will appoint to be Guardian.

*It being the case of a daughter
+ But might not the
mother be guardian
Under 4. & 5. Ph. & M.
L. R. the father not being
appointed a testamentary
guardian. See
3. Co. 39. & Co. Litt. 38.
L. 2. Ves. 374.*

ther as Guardian in Socage, or as Guardian by Nature; but she cannot be intitled to the Custody in the present Case as Guardian in Socage, it not appearing that the Infant had any Lands in Socage descended to her; nor can she be intitled as Guardian by Nature; for which Reason the Guardianship in the present Case is certainly such a one as this Court may dispose of; and the Question is, How this Court ought to dispose of it? Now his Lordship's Opinion was, That the Mother ought not to be allow'd it, by reason that she had married a Papist. In the Case of one *Barritt*, Lady *Tenam*, who was his Mother, insisted upon having the Guardianship of him; she was a Papist, but had married a Protestant. The Court were of Opinion, that Lady *Tenam* was not a proper Person to have the Guardianship of her Son, and appointed certain Persons to be Guardians of him, who were recommended by his Grandfather, who was a Protestant. From that Order an Appeal was had to the House of Lords the 16th of April 1724, and on the Appeal the House of Lords were of Opinion that Lady *Tenam* was not a proper Person to have the Guardianship, yet there she was not a Papist Convict, and by that Means disabled of the Guardianship. However, the other Part of the Order was reversed, and the Grandfather himself appointed the Guardian. For these Reasons his Lordship said, That the Mother of the Infant in the present Case must by no Means have the Custody of her; and the proper Direction will be to refer it to a Master to consider who will be a proper Person to have the Guardianship of her; the Grandmother may be at Liberty to propose her self before the Master. And so his Lordship was pleased to order accordingly.

*Jeffrys and Vanteswarstwarth.**August 2.*

MR. *Jeffrys*, Resident of the King of *Great Britain* at *Dantzick*, married there with a Lady of that City. During his Residence in that Quality he had two Daughters by her. His Wife died, he returned into *England*, and left his two Daughters there under the Care of their Grandmother. Their Grandmother was a wealthy Lady, worth 50000 *l.* The Grandmother died intestate, leaving two Daughters and the two Grand-daughters before-mentioned. The Daughters were married to two Senators of *Dantzick*, and on the Death of the Grandmother they took the Grandchildren into their Custody. The Grandmother's Estate consisted of 30000 *l.* in publick Securities in that City, and 20000 *l.* Securities in *England*; the Share that the Grandchildren were intitled to, both by the Law of *England* and the Laws of *Dantzick*, was one Third of their Grandmother's Estate, to be divided equally between them. Mr. *Jeffrys* being in *England* applied, in Behalf of his Daughters, to the two Senators who had married their Aunts, to have their Share in the publick Securities at *Dantzick* distributed to them. But they insisted, that by the Laws of that City that could not be done, unless a Burgher was appointed Guardian to them; they likewise refused to send him over his Children. Upon this he applied to the late Queen, during her Regency, desiring her Majesty to intercede with the States of *Dantzick*, that he might have his Children. The Queen did so, and at last the Children were sent to him. When they came over he placed them at a Boarding-school in *London*, and then he died. The young Ladies had no Relations in *England*, but had some Aunts in *Ireland* on their Father's Side, whom they had never seen. Their Aunts on their Mother's Side at *Dantzick*, whom they had been with before, had a great Mind that they should go over to them again, and the young Ladies had the same Inclination.

A Bill had been brought by their Father in their Names against Mr. *Vantefwarstwarth*, in order to have an Account taken of their personal Estate, and a Decree was made for that Purpose accordingly.

Thereupon a Petition was preferred in that Cause on the Part of the young Ladies, praying, that they might have Liberty to make a Visit to their Aunts at *Dantzick*.

Lord Chancellor order'd, That it should be referred to a Master, to inquire whether it was for the Interest of the young Ladies to go and make such a Visit? The Master reported, That it would be for their Interest to do so; but stated farther, That he had inquired of them, How long they intended to stay? and they told him, their Intentions were to stay a good while. Whilst this Matter was depending before the Master, the young Ladies were directed to think of two proper Persons here in *England* whom they should like to have for their Guardians; and they mentioned Lord *Middleton* and Mr. *Jacobson*; Lord *Middleton* refus'd to accept the Trust in case the young Ladies were to have Liberty given them to go and make the Visit at *Dantzick*; but Mr. *Jacobson* said, he was willing to accept the Trust generally.

And now the Matter came on again before the Court concerning what Directions were proper to be given in this Affair.

Lord Chancellor said, when this Matter originally came before him, he thought the Application was pretty extraordinary; however, he thought it proper to put it into such a Method of Inquiry, as is always done where the Interest of Infants is concerned, namely, to refer it to a Master to examine whether it is for their Benefit or not. At the same Time that he ordered this Reference he had no Intention to make an immediate Order upon it without taking
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some farther Care for the Infants Benefit. Here are two young Ladies that desire to go and make a Visit to their Aunts at *Dantzick*. But should they be suffered to do this without any Security given, they themselves would be out of the Reach of the Process of the Court; and the Persons in whose Hands they were would be out of the Power of the Court likewise. They might be married during their Absence abroad, without any Possibility of this Court's punishing the Parties concerned in it, and their Fortunes by that Means absolutely disposed of. Thus the Case stands in General. There are likewise some particular Circumstances attending it, which make their Going abroad highly improper without such Security given. 'Tis indeed true, that the young Ladies were born in *Dantzick*; however, they were as much natural-born Subjects of *England*, as if they had been born in this Kingdom, for they were the Children of the King's Publick Minister abroad. And even as the ancient Law stood, they were by this Means natural-born Subjects of *England*. They were born too after the Statute of the Seventh of the late Queen; and by that Means the Case is stronger; tho' some Limitations have been made to that Statute by an Act in the present King's Time. After the Birth of these Children, the Mother died; Mr. *Jeffrys* returned to *England*, and left them at *Dantzick* under the Care of their Grandmother. A Grandmother is by the Law *in loco parentis*; and for that Reason the leaving the Care of them with her was extreamly proper. And it was the more so as she was possessed of a Fortune of 50000 *l*. And the young Ladies stood in the Place of one of her three Daughters. The Grandmother died, and by that Means her Estate became distributable between her Daughters and these young Ladies. On the Death of the Grandmother the young Ladies went to their Aunts in that City; though their Aunts had an Interest opposite to them in Respect of the Division of the Estate. Mr. *Jeffrys* applied to have his Children come over to him; but that was opposed. The two Gentlemen that had married

Where Infants shall not be allowed to go abroad without giving Security for their Returning.

married these Aunts were Magistrates of *Dantzick*, and they mix'd their publick Authority with their Interest. It was a great Deal of Difficulty that the Father met with before he could get his Children over; and then he died. The present Application is, that the young Ladies might go to *Dantzick* again. It was desir'd at first only to be as a Visit. But it appears by the Master's Report, that their Intention is to stay a good while; and 'tis probable, that they intend to stay there, at least so long as they are under Age. 'Tis indeed true, that the young Ladies have had their Share of that Part of their Grandmother's Estate which was in *England*. But they have had no Part of that Estate which consists of Securities in *Dantzick*, and that amounts to 30000*l.* 'Tis necessary therefore, that before these Ladies are suffered to go there, a Recognizance should be entered into for their Returning. 'Tis necessary likewise, that Part of this Recognizance should be, that they do not marry whilst they are abroad, without the Leave of the Court. Anciently, when Wards of the Court stayed even in *England*, Recognizances of this Sort were entered into, that they should not marry without Leave of the Court. That Practice has of late Years been discontinued. But to this Day their doing so is judged a Contempt. For these Reasons no Order was made in this Matter at present till such Recognizance should be entered into. And the Matter was ordered to stand over. *Vide the next Case.*

Wherea Recognizance shall be entered into, that an Infant shall not marry without Leave of the Court.

August 6.

Jeffrys and Vanteswarstwarth.

Ante 141.

THE Matter now coming on again, Lord *Middleton* signified his Consent to accept the Guardianship of these young Ladies, under the Restrictions that the *Lord Chancellor* had before-mentioned; and thereupon the Court directed, that it should be referred to a Master to consider, what will be a proper Time for the young Ladies staying in *Dantzick*, and that Security should be given for their Return into *England* within that Time, and that

that they should not marry without the Leave of the Court.

The Attorney General and Lord Gore. *August 6.*

IN 1684 an Information was filed against the Corporation of *Newcastle under Line*, in order to take away their Charter, as was done at that Time against many of the Corporations of this Kingdom. Thereupon the Corporation came to a Resolution in that same Year, that they would surrender up their Charter to the Crown, with all their Estates and Franchises whatsoever, and that they would apply for a new Charter; but they resolved likewise, that before this Surrender was made, a Lease should be granted by the Corporation to *Tho. Ballard* and others, being Five in Number, for 1000 Years, in Trust to permit the Corporation to dispose of the Rents and Profits for the Maintenance of a Minister and Relief of the poor Inhabitants of the Borough, in such Manner as the Corporation should think proper. Thereupon an Indenture was made the same Day by the Corporation to the Lessees before-mentioned, reciting, That whereas the Corporation stood seised of these Lands, the Issues whereof were employed towards the Relief of the poor Inhabitants of the Borough, and the Minister of the Town, and other pious Uses; and whereas the Burden of the Poor was likely to increase by the Decay of the Trade; and whereas the Corporation have not easily got the Rents of those Estates by Reason of their being Let out to the Burgeses of the Town, who were Relations to the Members of the Corporation, the Corporation demised to the Persons before-mentioned all their real Estate whatsoever, for 1000 Years, in Trust, that the Corporation might make what Profits they could of them, and that they might dispose of the Rents and Profits for the Maintenance of a Minister and the poor Inhabitants of the Borough, in such Proportions as the Corporation should think proper; and in

Case the Borough should be disincorporated, then in such Proportions as one and twenty Inhabitants of the Town, to be elected by the Majority of the Inhabitants, should think proper ; and if there should happen to be an Overplus, then that the same should be applied by the Corporation for the raising of a Stock to set the Poor at work ; and for binding their Children out Apprentices, and for such other charitable Purposes as the Corporation should think fit. By this Deed the Lessees covenanted, that at the Request of the Corporation they would commence such Law-Suits, as the Corporation should think fit for the Benefit of those Estates, and that they would make such Leases likewise thereof as the Corporation should judge necessary, they being indemnified ; and in case the Borough should happen to be disincorporated, then these Law-Suits were to be commenced, and these Leases made according to the Direction of One and twenty Inhabitants to be chosen in the Manner before-mentioned, with a like Clause of Indemnity to the Lessees, after the making of these Leases. Notwithstanding the making this Lease, the Corporation continued Possession of the Premises to the present Time, and managed the Estates themselves as they had done before. They constantly maintained the Poor out of these Estates ; so that there was never any Rate made for their Relief. They paid their Minister sometimes 20 *l. per Ann.* sometimes 15 *l. per Ann.* and sometimes nothing. They sold some small Part of the Premises to Persons who had no Notice either of this Lease or the Trust of it. They made likewise two Leases of other Parts of the Premises to Lord Gore and Mr. Bourn. At the Time the Lease was made to Lord Gore he had no Notice either of the Lease of one thousand Years, or of the Trust of it. That Lease was made of a great many Houses in this Town, and made for the Purpose, that Lord Gore should rebuild them, and make the Street more commodious. That Lease was made at a very small Rent. At the Time the other Lease was made to Bourn he was Town-Clerk of this Corporation, and by that Means had so far Notice of the Lease of one thousand

thousand Years, and of the Trust of it, as that Notice might be inferred from his having the Custody of the Corporation-Books, in which Books an Entry was made of the Resolutions that have been mentioned; but he had no other Notice either of that Lease or of the Trust of it. That Lease was likewise made at a small Rent. In 1735 this Lease of one thousand Years was discovered by the Executor of the surviving Lessee, and in that same Year he made an Assignment of it to *Crew Offley*. Thus the Matter stood with regard to the Lease of one thousand Years. With regard to the Surrender of their Charter it did appear, that that was made likewise a short Time after this Lease; and the Corporation obtained a new Charter; but King *James* the Second published a Proclamation, whereby he declared, That the new Charters, which had of late been granted by the Crown to several of the Corporations in this Kingdom, were null and void; and thereupon this Corporation, as well as the other Corporations in this Kingdom, did not act under their new Charter, but acted under their old one.

The present Information was filed by the *Attorney General* at the Relation of ----- and of *Crew Offley*, who has been mentioned, to establish the Lease of one thousand Years made by the Corporation in 1684, and to have the Benefit of the Assignment of the Term. Another Part of the Information was, to establish the Charity to which the Lands are subject. It pray'd an Account of the Profits of the Estates, and to set aside the Purchases in Fee, and the two Leases made to Lord *Gore* and Mr. *Bourn*. The Information pray'd likewise, That the Plaintiffs may be quieted in the Possession of such Part of the Estate to which the Tenants have attorned, and to compel the Tenants of the remaining Part to attorn, and that the Plaintiffs by that Means may be put into Possession.

On the Hearing of this Cause *Lord Chancellor* thought it a Matter proper to be considered of; thereupon it was
ordered

Where the
Court will
not establish
a Lease.

ordered to stand over ; and now his Lordship delivered his Opinion in it. He said the principal Point arises on the Lease of one thousand Years made in 1684, and the Question is, Whether this Court ought to interpose in order to establish it ? At the Time this Lease was made there was an arbitrary and illegal Practice set on Foot in order to obtain the Surrender of Charters from Corporations ; that Practice extended to the present Corporation ; and in that Year an Information was brought against them in order to obtain a Surrender of their Charter. Thereupon the Corporation came to a Resolution to surrender it up to the Crown, and to apply for a new Charter ; but at the same Time they resolved instantly to make a Lease for one thousand Years of all their real Estate to *Thomas Ballard* and five other Lessees, in Trust to permit the Corporation to receive the Rents and Profits for the Maintenance of the Minister and of the poor Inhabitants of the Borough in such Proportion as the Corporation should think proper. Accordingly, by Indenture of the same Date, the Corporation did make such Lease, which Lease his Lordship stated, and was to the same Effect as is mentioned in the State of the Fact. Under this Lease the Lessees never had Possession, but the Corporation continued it to the present Time ; and it appears by the Entries in their Books, that from the Time of making that Lease they managed the Estates themselves in the same Manner as they had done before. The Lease lay dormant till 1735 ; then it was found by the Executor of the surviving Lessee, and assigned to *Crew Offley*. The Information is brought principally to have the Benefit of this Lease, and the other Relief that is pray'd is, in a great Part, consequential of it. But his Lordship's Opinion was, that this Court ought not to interfere in order to give any Assistance to this Lease ; and he thought there was no Ground that this Court should interfere, by reason of the Circumstances attending the Lease at the Time it was made, and by reason of the Circumstances that have happened subsequent to it. The Occasion of making this Lease by the

Corpo-

Corporation was plainly to protect themselves from the arbitrary Practice which has been mentioned. This appears from the Order enter'd in their Books, whereby it was directed, that a Lease of this Sort should be made; 'twas done with an Intention to deceive the Crown; and though they did it with that Intention, in order to protect themselves from so arbitrary Proceedings, they were not much to blame for it; for whatever Acts they could do, which the Law would allow of, they were justified in doing. However, he did not think that it was a Deceit upon the Crown neither; for the Crown had not so much their principal View to get in the Estates of the Corporations, as to get their Power from them. Another Reason of the Corporation's resolving to make this Lease might have been in order to secure those Estates, which they had from private Donors, from reverting into the Hands of the Heirs of those Donors; and had it not been for this Lease, they would have reverted to them on the Dissolution of the Corporation; for those Lands do not in such Case escheat to the Crown, but revert to the Heirs of the Donors, according to Lord Coke; and they would have so reverted, had it not been for the Lease in Question. After the Corporation came to a Resolution for making this Lease, and to surrender their Franchises and Estates to the Crown, they obtained a new Charter, and acted under that Charter till King James the Second published his Declaration, declaring the new Charters, that he had granted to the Corporations of this Kingdom, to be null and void; and thereupon this Corporation deserted their new Charter, as the rest of the Corporations of this Kingdom did, and acted again under their old one. And upon this Foundation it is, that almost all the Corporations of *England* stand, excepting the Corporation of *London*; for that Corporation indeed there was an Act of Parliament made, but for the others there was not. And on this Foundation it is, together with the Usage that has since obtained, and the known Illegality of those Proceedings, that the rest of the Corporations of *England* subsist. And as the Obtaining the Charter from this Corporation was null and void, all other Acts that they did in

How far
the Charters
granted to
Corporations
in the
Reign of
K. James 2.
are of no
Force.

Prospect of that ought to be looked upon as null and void likewise; and as the Crown quitted the Advantage which they got, it would be hard that this Court should set up the Lease. His Lordship said, That he would now consider the Acts that have been done subsequent to this Lease. The Trustees, as he had before observed, have had no Possession under it; and on Behalf of the Defendants it has been said, that the Want of this Possession is an Evidence after this Length of Time, that the Trustees surrender'd their Lease; and this would have been a strong Presumption of that Matter, even in a Court of Law. But there was no Occasion to enter minutely into the Consideration of that Point, because there is at least strong Reason why this Court should not establish it. And there was the stronger Reason that this Lease should not have the Aid of this Court; because it appears, that by the Frame of this Lease the Lessees were to be Trustees for the Body, and subject to the governing Parts of this Corporation. The Profits indeed of the Estates were to be applied for the Benefit of the Charity; but to be applied in such Manner and Proportion as the Corporation should direct. They were to make Leases likewise, and to do other Acts relating to these Estates, as the Corporation should direct; and what Ground is there for a Court of Equity to take the Possession of an Estate from *Cestui que Trust*, and to deliver such Possession to Trustees, unless there was some gross Mismanagement in the *Cestui que Trust*? This Court never takes the Possession from *Cestui que Trust*, unless there is some strong Reason for doing it; especially where there has been a Length of Time, as in the present Case there was. His Lordship said, That he would now consider the Assignment that has been made of this Lease. That must fall with the Lease it self; and there are more Objections to the Assignment than there are to the Lease it self; it was made after a Length of Time of one and fifty Years; during all which Time the Lease lay dormant. It was found accidentally. At the Time the Lease was made Six Persons were made Trustees. The Lease was assigned by the Executor of the surviving one, without the Approbation of the *Cestui que Trust*,

Where a Court of Equity will not take away the Possession from a *Cestui que Trust*.

How far an Assignee of a Lease shall be in no better Condition than the Lessee himself.

Trust, and without the Direction of this Court. Was it ever known, that a Representative of a surviving Trustee had such an Authority? The Consequence of this is, that all the Relief on this Part of the Case must fall to the Ground. The remaining Question to be considered is relating to the Charity; and it has been said, that whatever becomes of the Term, or the Assignment of it, it appears that the Estate was applicable to a Charity, and that upon that Ground this Court ought to interpose. And in that it has been rightly said; for if an Information is brought in the Name of the *Attorney General*, and it appears that there is a Charity which this Court ought to support, tho' the Information is mistaken, by praying such Relief for the Charity which cannot be had, yet the Court will not dismiss the Information, but will support the Charity in such a Manner as can be by Law. It has been said, that there does not appear to be sufficient Evidence to shew that this Estate belonging to the Corporation was subject to a Charity; but that does sufficiently appear. It is recited by the Lease of 1684, that the Issues of these Lands were employed towards the Relief of the poor Inhabitants of the Borough and the Minister of the Town, and other pious Uses. This is Evidence, that antecedent to the Lease the Rents used to be employed in that Manner. And tho' it is suggested, that that is a Fiction in the Recital, yet his Lordship said, he would not presume it to be so, unless Evidence had been shewn, that before the Making that Lease, the Rents and Profits were applied in a different Manner; but no Evidence of that Sort has been given. And it appears too from Expressions drop'd in the Entries in their Books, that some of their Estates were given them by private Donors for charitable Purposes. The Usage likewise since that Time, is Evidence of the Usage precedent, namely, that the Rents and Profits were so applied before that Time; and since that Time the Profits of these Estates have been employed for this Purpose. The Minister has been maintained out of them, not indeed by having a certain Allowance; for sometimes he has had 20*l.* sometimes 15*l.* *per Ann.* and sometimes nothing, and the Poor has been

Where the Court will not dismiss an Information, that is brought for a Charity.

Where it shall be said, that there is sufficient Evidence appearing of an Estate being subject to a Charity.

In what
Manner a
Charity shall
be directed to
be establish-
ed.

How far a
Town-
Clerk shall
be affected
with Notice
of Acts done
by the Cor-
poration.

been maintained out of them constantly. There have been no Instances of a Rate in this Town made for their Relief. For these Reasons his Lordship's Opinion was, that the Charity must be established; however, it deserves Consideration in what Manner it is to be established. The Charity must be so which is for the Support of the Minister. The Difficulty is concerning the *Quantum* that he must have. The right Way is, to decree these Estates to be subject to the Maintenance of the Minister, and the other charitable Purposes, according to the Discretion of the Corporation, with Liberty to apply to the Court in Case the Corporation do not exercise their Discretion in a reasonable Manner. The remaining Question is relating to the Conveyances in Fee, and the two Leases to Lord Gore and Mr. Bourn, made since the Lease that has been mentioned. With regard to the Conveyances in Fee, they must stand. The Purchasers had no Notice either of that Lease, or of the Trust of it, and it does not appear but they paid a sufficient Consideration. The Lease likewise to Lord Gore cannot be affected with Notice. There is more Reason, however, to affect Bourn with Notice, he being Town-Clerk; and on that Account to be supposed to be acquainted with the Entries in the Corporation-Books; however, both those Leases may be affected, provided they have not been made without reserving a sufficient Rent. His Lordship said he would direct it to be inquired into by the Master, whether they were made at a sufficient Rent, or not. And so his Lordship was pleased to decree accordingly. Vide the next Case.

The Attorney General and Lord Gore.

Ante 145.

FROM this Decree there had been a Re-hearing, which was in Part heard at the setting down of Causes after *Michaelmas-Term* last. But now the Parties came to an Agreement, that the Decree should be reversed upon certain Terms specified between them. And it was so reversed accordingly.

Sir Robert Walpole and Lord Conway. August 7.

*J.C. Notes from Sewall Case Papers vol. 1. p. 68.
see Mr. Pearce on Rem. p. 226
of Mr. Bynker's
ed. in*

IN 1703, on the Marriage of Francis Lord Conway with Lady Mary Hide, the Daughter of the late Earl of Rochester, Articles were entered into, whereby it was agreed, that the Fortune of the Lady was to be 10000*l.* but only 5000*l.* Part thereof, was paid down, and the remaining 5000*l.* was agreed by those Articles to be paid, with Interest, into the Hands of the Trustees within one Year after the Marriage, in Trust that the same should be laid out in the Purchase of Lands, and that those Lands should be settled to the Use of Francis Lord Conway for Life, the Remainder to Lady Mary the intended Wife for Life, the Remainder in Trust for such Child or Children and for such Estates absolutely or conditional, or subject to the raising such Sums upon them for the Benefit of such Children, in such Proportion as Francis Lord Conway should appoint; and in Default of such Appointment to the Use of all and every of the Daughters, younger Sons, and the Heirs of their Bodies; and if only one Son, then to him and the Heirs of his Body, the Remainder to the Father in Fee. The Marriage took Effect; there was Issue of this Marriage four Daughters, Lettice, Mary, Harriot and Catharine; Lettice died in the Life-time of Francis Lord Conway, without being married; and thereupon Francis Lord Conway made two Leases of certain Lands for forty-one Years, in Trust for the raising Portions for the surviving Daughters, payable at their Age of Seventeen, upon Condition, that if they should marry without Consent of their Father, then the Benefit of those Portions to be raised by those Leases should cease; but those Deeds were subject to a Power of Revocation. After the making these Leases, Mary married with ——— Pring, without the Consent of Francis Lord Conway. The Lady of Lord Conway dying, he married a second Wife, named ——— and by the se-

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cond Venter he had two Sons, the present Lord *Conway* and *Henry*; he makes his Will, and thereby gives to *Harriot* 6000*l.* and then comes a Clause with the following Recital, “Whereas I did demise certain Lands to Trustees
“ for forty-one Years, to hold at their ancient Rent, by
“ Way of Provision for younger Children; and whereas
“ there would be great Arrears in the Hands of the
“ Trustees, arising from the Profits of those Leases; and
“ whereas there is due to me the Sum of 5000*l.* for and
“ on Account of my first Wife, the Daughter of the late
“ Earl of *Rochester*, so that my personal Estate will be
“ sufficient to pay my Debts and Legacies; yet lest it
“ should not, he devised certain Lands to Sir *Robert Wal-*
“ *pole*, in Trust, to supply any Deficiency of his personal
“ Estate, and the Residue of that personal Estate he gave
“ to Sir *Robert Walpole*, in Trust for *Henry*.” *Catharine*
died, and *Harriot* became her Administratrix. And by
this same Will he gives one Legacy of 5000*l.* to *Mary*, and
another Legacy of 5000*l.* to *Catharine*. To this Will
he makes a Codicil, and thereby gives a Legacy of
5*l.* to his Daughter *Mary*, in full of all Benefit of his
Estate. The present Bill was brought by Sir *Robert Wal-*
pole, as Trustee for *Henry Conway*, against the present Lord
Conway, against *Harriot Conway* and against *Pring*, the on-
ly Son of *Mary*, one of the Daughters before-mentioned,
in order to have an Account of the personal Estate of
Francis Lord Conway. A Cross Bill was brought by *Har-*
riot Conway, in her own Right, and likewise as Admini-
stratrix to *Catharine*, in order to have the Benefit of her
Share in the 5000*l.* agreed to be laid out in Land by
the Marriage-Articles.

The *Attorney General* argued on the Part of the Plaintiff
in the original Cause, and for Authority cited the Case of
Noys and Mordant, that of *Stretfield and Stretfield*, deter-
mined by Lord *Talbot*, and that of *Parry* and the Duke of
Cleveland.

Mr. *Murray* argued as Counsel for Miss *Harriot Conway*, and for Authority cited the Case of one *Price*, determined at the *Rolls* about three Years ago.

Lord Chancellor said, That in the present Case, the Interest of several Persons comes to be considered, arising from the Portion of Lady *Mary Hide*. Here are two Bills brought, one by Sir *Robert Walpole*, as Executor to *Francis Lord Conway*, and the End of that Bill is to increase the personal Estate of the Testator as much as may be. The other Bill is brought by Miss *Harriot Conway*, claiming her Share in the 5000 *l.* agreed by the Marriage-Articles to be paid to the Trustees for the Purposes therein mentioned, and that she claimed partly in her own Right, as she is the only surviving Daughter of the late *Lord Conway*, and partly as she is Administratrix to her Sister *Catharine* deceased.

To these Bills *Pring* is made a Defendant, who is an Infant, and the only Son of *Mary*, another of the Sisters. He insists, That he is intitled as Issue in Tail to that Share in the Estate which his Mother would have had, provided the 5000 *l.* had been invested in Land, and she had survived her Father.

Lord Conway claims an Interest likewise in this 5000 *l.* as he would have been intitled to have had the Remainder in Fee, provided it was laid out in Land. The Whole arises on the Articles of Marriage in 1703, which his Lordship stated to the same Effect as is before-mentioned. The Fact that has happened has been, That there were four Daughters of this Marriage, *Lettice*, *Mary*, *Harriot* and *Catharine*. *Lettice* died in her Father's Life-time, without having ever been married; *Mary* married without his Consent, but died in her Father's Life-time leaving *Pring*, one of the Defendants; *Harriot* and *Catharine* survived the late *Lord Conway*; *Catharine* is since dead, and *Harriot* is become

come her Administratrix. The late Lord *Conway*, after the Death of his Wife, by whom he had these four Daughters, and after the Death of *Lettice*, executed two Leases to Trustees for Forty-one Years, for the raising Portions for his Daughters, provided they married with his Consent. After this he marries again, has Issue the present Lord *Conway* and *Henry*. He then makes his Will, and thereby gives 6000 *l.* to his Daughter *Harriot*.

His Lordship then stated the rest of the Will to the same Effect as is before-mentioned. Upon this State of the Fact his Lordship said he would first consider the Interest which *Pring* claims in this Estate, and he would consider his Claim as it stood originally under the Articles, and likewise as it stands affected by the subsequent Acts that have been done. And his Lordship said he would in the first Place consider the subsequent Acts that have been done by the late Lord *Conway*; and with regard to them, provided *Pring* the Infant could have had any Title under the Articles, his Lordship's Opinion was, that none of the subsequent Acts would have been any Bar to him. The only Grounds, upon which it can be pretended that such Bar arises, are either, that the Father has made an Appointment of this 5000 *l.* in such a Manner, that *Mary* the Mother of *Pring* was to have no Benefit from it, or that what he has given the Mother since is a Satisfaction for that Demand; but his Lordship's Opinion was, That in neither of these Ways would any Bar arise to *Pring*, provided he had any Title under those Articles. As to any Appointment surely there is no Colour for it, nor can it be said, that any Satisfaction can be construed to arise from the Leases that were made. In those Leases there are no Words that import either an express or implied Satisfaction. In those Leases no Notice is taken of the Articles. The Objection is, That were those Leases not to be construed a Satisfaction of the Articles, here would be double Portions; but that Objection arising from

What shall not be construed to be a Satisfaction in Equity.

Where a Person may be intitled to double Portions when they come from different Persons, or from the same Person in different Rights.

from double Portions does not hold but where both the Portions come from one and the same Person. Whereas, in the present Case, one Portion came from the Mother, and the other from the Father. And the Case of *Duffield* and *Smith* before Lord *Somers* was a stronger Case in this Respect than the present one. There was one Portion agreed to be paid by a Brother in his own Right, another was due from him as Executor to his Father. Lord *Somers* indeed held, that the one Portion was a Satisfaction for the other; but that Decree was reversed in the House of Lords. The only Doubt in the present Case arises from the Will and Codicil. As to the Will, the Father does indeed give to *Mary* 5000 *l.* but that is by no Means declared to be in Satisfaction of what she was intitled to from her Mother's Portion by the Articles; and besides, that Legacy is revok'd by the Codicil. And as to the Codicil, it is indeed true, that the Father does thereby give his Daughter *Mary* 5 *l.* in full of all Benefit of his Estate. But still that will be no Bar to *Mary's* Share; for by the giving her that 5 *l.* he seems only to design to exclude her from all Benefit of his Estate, but does not seem to design to exclude her from the Benefit of the Estate that came from her Mother. The Question then to be considered is, Whether under the Articles *Pring* the Infant could be intitled to any Benefit of this Estate? But his Lordship said his Opinion was, That *Pring* the Infant had no such Title. With regard to this Part of the Case the 5000 *l.* must be considered as laid out in Land. But then the Interest, under which *Pring* can claim any Benefit, must have been a contingent Remainder, and that to the Time of the Death of the late Lord *Conway*. The late Lord *Conway* had a Power, during all his Life-time, to limit the Estate amongst the Daughters and younger Sons in such Manner as he thought proper; and therefore, during all that Time, the Remainder over to those Children, in Default of such Appointment by the Father, must have been contingent. This is agreeable to the third and fourth Resolution in the Case of *Lodington* and *Kime*, reported in *Salk.* 224. there it is said, Thirdly, That

What shall
be said to be
a contingent
Remainder.

Where there shall be said to be two contingent Remainders, either of which may happen upon a certain Event.

this Limitation to the Issue was not an executory Devise being after a Freehold, but a contingent Remainder; so that a Posthumous Son could never take. Fourthly, That the Remainder limited to the Issue of A. was a contingent Remainder in Fee, and that the Remainder to B. was a Fee also. But those Fees are not like one Fee mounted on another, nor contrary to one another; but two concurrent Contingencies, of which either is to start according as it happens; so that these are Remainders cotemporary and not expectant one after another. So likewise is the fifth Resolution in that Case, and may be applied to the present Purpose; there the Words are, The Court held, that the Remainder in Fee to B. was not vested, because the precedent Limitation to the Issue of A. was a contingent Fee; and they took this Difference, viz. Where the Mesne Estates limited are for Life or in Tail, the last Remainder may, if it be to a Person in Esse, vest; but no Remainder limited after a Limitation in Fee can be vested. By these Resolutions it appears, that both the Remainders to the Children are contingent ones; and as this Remainder, which was to take Effect on Default of the Father's making an Appointment, must have been contingent for the Benefit of the Daughters and younger Sons to the Time of the Death of the late Lord Conway, the Consequence is, that as Mary, one of the Daughters, died in his Life-time, her Issue can have no Benefit from it. The next Point to be considered is, the Interest of Miss Harriot Conway, and that both in her own Right and likewise as she is Administratrix to her Sister Catharine. Both of them survived their Father, and therefore there is not the same Objection with Regard to them as there is with Regard to Pring. Under the Articles Miss Harriot, in both her Rights, has a clear Title; and the only Question will be, How far she is barred with Regard to those Rights by the subsequent Acts of her Father? The Father, by his Will, has given her 6000 l. and she cannot be allowed to claim under the Articles and Will both; but she must make her Election which she will abide by; for it appears expressly by this Will, that the Testator has considered the 5000 l. as Part of his personal Estate.

Where a Person must claim by the Whole of a Will, tho' the Party appears to be mistaken in his Right.

He has indeed been mistaken in that ; but that can make no Difference. 'Tis sufficient to say, that he consider'd that 5000 *l.* as Part of his personal Estate, out of which Miss *Harriot* was to have her Satisfaction for her Legacy of 6000 *l.* and therefore she cannot claim that 6000 *l.* and her Interest in the 5000 *l.* likewise. This 5000 *l.* was to be Part of the Fund out of which the Legacy was to be paid her ; and she can never have the Legacy it self, and likewise Part of the Fund which the Legacy was to come out of. This is agreeable to the Case of *Noyse* and *Mordant*, and that of *Stretfield* and *Stretfield*, which have been cited. And to shew, that the Testator's being mistaken in his Right with Regard to the 5000 *l.* by considering it as Part of his own Estate, could make no Difference, he said, that in the Case of *Noyse* and *Mordant* the Party was mistaken in his Right, and yet that was held to be no Objection. For these Reasons his Lordship observed, that Miss *Harriot* must make her Election, whether she will take under the Will or under the Articles. But then his Lordship said, That as he was speaking a Doubt arose in his Mind with Regard to *Pring* ; and at present he was not satisfied but he might take the same Share in the Estate as his Mother would have had, if she had survived the late Lord *Conway*. And though this is a contingent Remainder, yet his Doubt was, Whether, according to *Archer's* Case, the Issue would not be intitled to the Benefit of it, by standing in the Place of his Mother. However, he said he would reserve that Point till the Infant came of Age. And so his Lordship was pleased to decree accordingly.

Where a Person being mistaken in his Right will make no Difference.

June 14.

Dyer and Pulteney.

IN 1726 Mr. *Pulteney* contracted with the Earl of *Essex* for the Purchase of the Manor and Advowson of *Wrington* in the County of *Somerset*, for 27600*l.* Soon after, Mr. *Pulteney* being put into Possession of the Premises, appointed Mr. *York* to be his Steward to look after the Manor, and to receive the Rents and Profits arising from it. In September 1732, Mr. *Pulteney* went into *Somersetshire* to view his Purchase, and after he had seen the same, he was uneasy at it; this Estate was chiefly let out upon Lives; and *York* proposed to Mr. *Pulteney* to take the Purchase off his Hands at the Price he gave for it. But as *York* was not in Circumstances to pay the Purchase-Money, he told Mr. *Pulteney*, that his Design was to raise the Money by selling the Estate out to the Under-tenants in small Parcels. Mr. *Pulteney* declared, that he would not sell Part of the Estate, unless he could sell the Whole. And thereupon, on the 20th of *March* in that same Year, Mr. *Pulteney* and *York* came to an Agreement relating to this Estate; which Agreement was to the Effect following. “ An
 “ Agreement entered into between *William Pulteney Esq;*
 “ and Mr. *James York*, for the Sale of the Manors of
 “ *Wrington* and *Ubley*, with their Appurtenances, in the
 “ County of *Somerset*, to *James York*. It is agreed, that
 “ Mr. *York* should pay to Mr. *Pulteney* 27600*l.* for the
 “ Purchase, within two Years, to be computed from
 “ *Lady-day* next, together with Interest for the same in
 “ the mean Time, after the Rate of 4*l. per Cent. per Ann.*
 “ and that he shall pay such further Sum or Sums of
 “ Money as shall be the Value of any Life or Lives that
 “ shall happen to die, if any, before *Lady-day* next, or
 “ which are now dead, but mentioned in the particular
 “ hereunto to be living, together with Interest for the
 “ same from the Time, and at the Rate aforesaid; and
 “ that he shall pay 10000*l.* Part of the Purchase-Money,
 “ on

“ on or before *Midsummer* next, and the Remainder of
“ the Purchase-Money at such Times, and in such
“ Manner, as he shall think fit, so that the Time does
“ not exceed the two Years, and the Sum not less
“ than 1000*l.* at one Time. Upon the Performance
“ of the Agreement on the Part of Mr. York, Mr. Pul-
“ teney agrees that Mr. York shall have, to his own Use
“ and Benefit, the Manors of *Wrington* and *Ubley*, with
“ their Appurtenances, and all the Rents and Profits
“ thereof which have been due since Mr. Pulteney's Pur-
“ chase thereof from the Earl of *Essex*, or shall here-
“ after grow due, except the Sum of 1264*l.* 19*s.* 2*d.* ¹/₄
“ already paid or accounted for by *James York* to
“ Mr. Pulteney; and that Mr. Pulteney shall and will, at any
“ Time or Times, execute such Leases and Conveyances
“ for filling up of Lives upon any particular Part of the Ma-
“ nor of *Wrington*, and for conveying the Inheritance there-
“ of as Mr. York shall desire, he paying the Charges there-
“ of, and likewise paying the Fines and Purchase-Money
“ for such particular Parts thereof to Mr. Pulteney, in Part
“ and on Account of the original Purchase-Money of
“ 27600*l.* such particular Sums not to sink the Interest
“ of the original Purchase-Money, unless the Sums so paid
“ shall amount to 1000*l.* and when the whole Purchase-
“ Money and Interest shall be paid, Mr. Pulteney shall and
“ will, upon the Request, and at the Charges of *James*
“ *York*, execute proper Conveyances for conveying the
“ Fee-simple and Inheritance of the Manors and Premises,
“ or of such of them as shall remain then undisposed of,
“ to *James York*, his Heirs and Assigns, or to such other
“ Person or Persons as he or they shall direct and ap-
“ point.” *York* was not able to raise the 10,000*l.* ac-
cording to his Contract; and thereupon in 1733, a Bill
was brought against him by Mr. Pulteney, in order to com-
pel the Performance of it; and thereupon *York*, by the
Assistance of his Friends, procured the Raising of 2450*l.*
and that Sum of Money was paid to Mr. Pulteney. In
1734 *York* summoned the Tenants of the Manor of

T t *Wrington*

Wrington to attend him, and shewed them a Copy of the Contract made by him with Mr. *Pulteney*, the Original being in Mr. *Pulteney*'s Hands, and told them at what Price they might Purchase the Fee of their respective Estates; to which the Plaintiff *Dyer*, and great Part of the Tenants agreed. The Plaintiff accordingly entered into an Agreement with *York* for the Purchase of Part of the Lands in *Wrington*, which were in the Plaintiff's Occupation, which Agreement was to the Effect following, viz. "The
" Manor of *Wrington*, Octob. 6. 1734. Then contract-
" ed and agreed with *Dyer* for and on Behalf of
" Mr. *Pulteney*, by Virtue of an Agreement made and
" concluded by *York* with him, dated the 20th of *March*
" 1732, that in Consideration of 1245 *l.* to be paid on
" the executing the Deed of Purchase, or from that Time
" at 4 *l. per Cent.* for the same, with good Security then
" to be given for the same, Mr. *Pulteney* should and
" would at the same Time grant and convey to *Dyer* and
" his Heirs, by such Conveyances as *Dyer*'s Counsel should
" advise, clear of all Incumbrances, the Reversion in Fee
" of the several Estates mentioned in the Bill, after the
" Death of the Lives on the several Estates, with all
" Rents, Customs and Services due and payable for the
" Premises; and it is agreed, that Mr. *Pulteney* should be
" at the Charges of making a good Title in Fee of
" the Premises to *Dyer*, and his Heirs, clear of all In-
" cumbrances, and that *Dyer* should only be at the
" Charge of the Lease and Release to him." But in this
Contract there was a *Proviso*, that if the Tenants of the
Manor, or any other Persons, should not purchase or agree
for three Fourth Parts of the Manor, then the Contract to
be void. The total Sum of the whole Purchase-Money,
which *Dyer* and the rest of the Tenants had agreed to give
for their Estates, did not quite come up to the three
Fourths of the 27600 *l.* before-mentioned, but wanted
200 *l.* of that Sum. *Davis*, who was a Counsel living in
the Neighbourhood, was employed by *York* and likewise by
Dyer, and the several Tenants that had made Contracts
for

for this Estate, to peruse the Title, and settle the Conveyance. In order to this, the first Step thought proper to be taken was, that Mr. *Pulteney* should send down an Abstract of his Title for *Davis's* Perusal; and such Abstract was sent down accordingly. After the Abstract was sent down, a Draught of a Conveyance was made; it was made by *Blythman*, who was Solicitor for Mr. *Pulteney*, and sent down to *Davis*. And this Draught was intended to suit not only the Contract that *York* had made with *Dyer*, but to suit the several other Contracts that *York* had made with the rest of the Tenants. In this Draught, as settled by *Blythman*, there were Blanks left for the Names of the Persons that were to be Parties to the Deed. It was drawn as a Conveyance from *Pulteney* to the Contractors; it was said to have been in Pursuance and Part Performance of the original Contract between Mr. *Pulteney* and *York*, with the Consent and Approbation of *York*; and in this Draught a Covenant was inserted, whereby *York* agreed, that the Premises were free from all Incumbrances made by him. A short Time before this Draught was made, namely, in the Beginning of *April* 1735, *Watson*, who was an Agent likewise for Mr. *Pulteney*, writ down to *York*; wherein he tells him, That Mr. *Blythman* had thought it necessary to settle the Draught in the Manner that has been mentioned. The 26th of the same Month he writes another Letter to *York*; wherein he tells him, That Mr. *Pulteney* approved of the Draught as *Blythman* had settled it; and tells him farther, That Mr. *Pulteney* intended, that Mr. *Watson* should receive the Purchase-Money of *Dyer*, and the rest of the Contractors, unless *Davis* would think proper to receive it. But notwithstanding this Letter, in the *May* following *Dyer* pays 200 *l.* Part of his Purchase-Money, to *York*. And the 16th of *August* following *Blythman* writ a Letter to *York*; wherein he told him, That Mr. *Pulteney* was willing to convey to the Purchasers. When this Draught was sent down to *Davis*, *Davis* made the following Alterations in it, by inserting the Names of *Blythman* and *Watson* in one of the Blanks, for the Names of the Parties to the Indenture, and by striking out all that

Part

Part of it which related to *York*; so that he would have had it only as an immediate Conveyance from Mr. *Pulteney* to *Dyer*, and the same to the rest of the Contractors, without mentioning *York* at all. Mr. *Pulteney* refused to agree to sign the Draught as *Davis* had alter'd it. After this Mr. *Pulteney* was about to set out for a Journey to *Spaw* for the Recovery of his Health; and a short Time before he went he made a Conveyance of this Estate to *Watson*, as a Trustee for him, and thereby empower'd him to convey the Whole, or in Parcels, to the several Contractors. Whilst Mr. *Pulteney* was gone to *Spaw*, *York* made an Assignment of his Contract with Mr. *Pulteney* to two Relations of his named *York*. He afterwards died, and made his Wife his Executrix. Mr. *Pulteney* returned from *Spaw*, and upon his Return declared, that nothing farther should be done in this Matter. Upon this most of the Contractors relinquished their Contracts; but *Dyer* insisted, that his should be carried into Execution; and thereupon he brought the present Bill against Mr. *Pulteney*, against the two *Yorks*, who were Assignees of the Contract made by Mr. *Pulteney* with *James York*, and against the Administratrix of *James York*, in order to have a specifick Performance of this Agreement, or at least a personal Decree against the Administratrix.

Mr. *Floyd* argued as Counsel for the Plaintiff, and for Authority cited 2 *Vern.* 186.

Lord Chancellor said, That the Proposal made by *York* to Mr. *Pulteney* in the present Case was, that he would sell the Estate in Parcels; but that Mr. *Pulteney* refused to do, and declared, that he would not sell the Estate at all, unless he could sell the Whole. And thereupon Mr. *Pulteney* and *York* enter'd into the Agreement which has been mentioned. After this Agreement enter'd into, *York* took several Steps in order to carry it into Execution; and one of those Steps was the Contract which he enter'd into with *Dyer*; and at the same Time *York* enter'd into several other Contracts with other Tenants of this Manor. As these

Con-

Contracts were enter'd into, Mr. *Pulteney* was then applied to in order to complete them. For this Purpose it was desired of him, that he would send down to Mr. *Davis* an Abstract of his Title, which he accordingly did. A Draught likewise was prepared by *Blythman*, who was Mr. *Pulteney*'s Solicitor. The Draught was sent to *Davis*, and altered by him; but Mr. *Pulteney* never agreed to those Alterations that were made in the Deed.

And now the present Bill is brought by *Dyer*, in order to compel Mr. *Pulteney* specifically to perform his Agreement, and at least to have from him the 200*l.* which was paid to *York* in May 1735; and if no Decree could be had against Mr. *Pulteney*, the Bill pray'd, That a personal Decree, by way of Satisfaction for not performing the Contract with the Plaintiff, might be had against the Administratrix of *York*, and likewise that she might account for the 200*l.*

His Lordship said, That in order to determine the present Questions three Matters are proper to be considered. First, Whether Mr. *Pulteney* ever gave an Authority to *York* to make these Contracts with *Dyer*, or any other of the Under-Tenants, for and on the Behalf of Mr. *Pulteney*? And secondly, Suppose he did not, as *York* had an Interest under the Article which Mr. *Pulteney* enter'd into with him, and as *Dyer* has an Interest under the Article which was enter'd into between him and *York*, Whether he is not intitled to stand in the Place of *York*, and to compel Mr. *Pulteney* to perform the Agreement which he enter'd into, in the same Manner as *York* himself could? And in the last Place, Whether *Dyer* is not intitled to have a personal Decree against the Administratrix of *York*, by way of Satisfaction for Performance of the Contract which he and *York* enter'd into? The first of these Matters divides it self into two. In the first Place, Whether, by the Acts precedent to the Contract between *Dyer* and *York*, it appears that *York* had an Authority to act as Agent for Mr. *Pulteney*, and on his

Where a Person shall be said to have an Authority to act as Agent for another.

Where a
Person shall
be said to
confirm
what ano-
ther has
done.

Constructi-
on of an Ar-
ticle for the
Purchase of
an Estate.

Where a
Person shall
be said to be
intended to
become the
Purchaser of
an Estate.

Behalf? And secondly, Supposing he had not, Whether, by the subsequent Acts, which Mr. *Pulteney* or his Agents were a Party to, there has not been so far a Confirmation of the Contract which *Dyer* and *York* engaged in, that *Dyer* will be intitled to compel Mr. *Pulteney* specifically to perform his Agreement? With Regard to the first of these Inquiries, it must be determined by the Article which was enter'd into between Mr. *Pulteney* and *York*; and it is necessary therefore to consider the Terms of that Article. By that Article *York* was to become the Purchaser of the Estate conditionally indeed, provided that he paid 10,000*l.* Part of the Purchase-Money, by *Midsummer*, and the rest of the Purchase-Money within two Years from the Time of the Contract; but even that Remainder of the Purchase-Money was not to be paid in less Sums than 1000*l.* at a Time. There is not one Word in this Contract that gives the least Intimation, that *York* was to act as Agent for Mr. *Pulteney*. And it clearly appears, that as between Mr. *Pulteney* and him he was to become the Purchaser. So far indeed is true, that it was not intended, that he was to continue Proprietor of the Estate, because it was necessary for him to sell the Estate out again in small Parcels, in order to raise the Sum of Money which he had agreed to pay Mr. *Pulteney*; but that Circumstance makes no Difference. It has been said by the Counsel for the Plaintiff, that there is a Clause in this Article, by which Mr. *Pulteney* agrees to execute Conveyances of the Estate to the several Parties that shall become Contractors; and from thence an Argument has been drawn, that *York* was merely an Agent. And true indeed it is, that there is such a Clause in the Article. But was that Conclusion to be drawn from it, it would over-throw the Intention of it; and the Consequence of this is, that were it not for the Facts that have happened subsequent to this Contract, there is no Pretence to say, that *Dyer* could come against Mr. *Pulteney*, upon a Supposition that Mr. *Pulteney* contracted with him by the Agency of *York*; and therefore it will be proper to be considered, whether the Transactions which

Mr.

Mr. *Pulteney* or his Agents were a Party to, subsequent to the Contract between *Dyer* and *York*, will make any Difference in the present Case; and whether by those Acts Mr. *Pulteney* has confirmed that Agreement. This will a good deal depend upon the Facts themselves, and the Letters that were writ. And in the first Place it is proper to take Notice, that there has been no Act done by Mr. *Pulteney*, or any of his Agents, to confirm this Contract in particular which *Dyer* and *York* engaged in; but all those Acts related to every one of those Contracts equally. Now as to the Facts, one that has been relied upon is, That Mr. *Pulteney* was acquainted, that in the Contracts between *York* and the Tenants it was specified, that *York* contracted with them for and on the Behalf of Mr. *Pulteney*; but then it appears by the Proofs, that Mr. *Pulteney* declared over and over, that *York* had no Authority to undertake for him; nor will the Letters that have been writ affect Mr. *Pulteney* in the present Case. With Regard to the first of them it is indeed said, that Mr. *Blythman* could think of no other way than by making the Conveyance from Mr. *Pulteney* to the Contractors by the Approbation of *York*. But no Argument can be drawn from thence to shew, that in Equity he was not considered the Purchaser of that Estate. By the original Contract he had not indeed the legal Title; and that was the Reason for intending to make the Conveyance from Mr. *Pulteney* to the Contractors. But then Mr. *Pulteney* was to convey with the Consent and Approbation of *York*; which shews, that *York* was considered not as an Agent for Mr. *Pulteney* in this Matter. And this gives an Answer to the Objection arising from the first Letter; nor can any Objection of Weight arise from the second Letter; that indeed does direct Mr. *Dyer*, and the rest of the Contractors, to pay the Purchase-Money to Mr. *Pulteney*; but that was no more than what *York* had agreed to by the original Contract. And with regard to the third Letter, no greater Objections arise from that than arose from the first. The next Thing proper to be considered will be the Draught of the Conveyance, that was made in
the

the present Case. And with regard to that, it will be proper to consider it in two Lights; one as it was settled by *Blythman*; the other as it was altered by *Davis*. As this Draught was settled by *Blythman*, it is extremely clear, that *York* was not barely consider'd as an Agent in this Transaction. The Conveyance, as has been before said, was to have been made by Mr. *Pulteney* to the Contractors, with the Consent and Approbation of *York*. It is said to have been in Pursuance and Part Performance of the original Contract between Mr. *Pulteney* and *York*. And besides, *York* was even to covenant, that the Estate was free from Incumbrances made by him; which Clause manifestly speaks, that *York* was considered more than an Agent. But as *Davis* alter'd this Draught, the Case would have been quite different, provided Mr. *Pulteney* had agreed to the Alterations which *Davis* made in this Draught; for he struck out all the Parts of it, that related to *York*. But then Mr. *Pulteney* refused to agree to the Draught as thus it was alter'd. To consider then the other Facts subsequent to the original Contract, that have been made Use of as Arguments in the present Case, to shew that Mr. *Pulteney* had confirmed what *York* had done. One of those Facts insisted on has been Mr. *Pulteney*'s sending down an Abstract of his Title; but he could do no less than that, and therefore no Inference of this Kind can be drawn from that; nor can any Conclusion of this Sort be made from Mr. *Pulteney*'s bringing his Bill against *York* for a Performance of his Contract. That Bill indeed he brought subsequent to the Time that the 10,000 *l.* ought to have been paid; and so far an Inference may be drawn from the bringing that Bill subsequent to that Time, that Mr. *Pulteney* did thereby dispense with the Circumstance of the 10,000 *l.* not being paid on the Day, as it ought. But as Mr. *Pulteney* by that Bill insisted, that *York* should perform his Contract with him, by paying the 10,000 *l.* it is impossible to imagine, that Mr. *Pulteney* has dispensed with the paying the 10,000 *l.* at all; and that he, by his bringing the Bill, should confirm what *York* has done, without having that Sum of Money

ney paid him. The bringing that Bill imports the direct contrary, and shews, that Mr. *Pulteney* insisted, that the 10,000 *l.* should be paid him; whereas a very small Part of that Sum has been paid even to this Day. Another Argument that has been made Use of upon this Part of the Case by the Plaintiff's Counsel, has been the Conveyance that Mr. *Pulteney* made to *Watson*. And it has been said, that by that Conveyance he empower'd *Watson* to convey this Estate in the Whole or in Parcels; and from thence an Argument has been urged, that Mr. *Pulteney* had changed his Design, which he had at first of selling the Whole of this Estate, or else not disposing of any Part of it; but no such Conclusion can be drawn from the Transaction with *Watson*. Mr. *Pulteney*, by his original Contract, was bound to convey to the several Purchasers that should be found for this Estate; and as he was going to *Spain*, there was a Necessity for his making a Conveyance of this Sort to a Trustee, in order to enable him to do the same Thing which Mr. *Pulteney* himself would have been bound to have done. Thus much may be proper to be said in order to give a particular Answer to the several Facts in the present Case, from whence Arguments have been drawn to shew that those Facts amounted to an absolute Confirmation of the Contracts which *York* had engaged in. But one Observation may be made upon all of them, namely, that supposing those Acts are of a doubtful Nature, whether they amount to a Confirmation or no, the proper Construction to be put upon such Acts is, to endeavour to construe them to be consistent with the original written Agreement of the Parties, and not that they should vary from it. His Lordship said, he would now consider the second Question in the present Case, namely, that supposing the Plaintiff is not intitled in his own Right to compel Mr. *Pulteney* to perform this Contract with him, yet whether he is not intitled to do so, as standing in the Place of *York*? But his Lordship's Opinion was, that he was not. Did indeed the Plaintiff submit to stand in the Place of *York* in the Whole of the Agreement that *York* enter'd into with

Mr. *Pulteney*, the Plaintiff would be intitled to stand in the Place of *York* for the Purpose that has been mentioned, provided the Terms of the Contract between the Plaintiff and *York* had been performed; but that the Plaintiff by no Means submits to do. And as he does not, he cannot have this Privilege; nor are even the Terms of the Contract performed which the Plaintiff enter'd into with *York*. For it was an exprefs Condition of that Contract, that Purchases should be found for three Fourths of the Value of this Estate; whereas the Money which the several Purchases came to does not amount by 200 *l.* to the three Fourths even of the Value of the Estate, as it was fixed upon between Mr. *Pulteney* and *York*. And besides, according to the Terms of that Contract between the Plaintiff and *York*, the three Fourths were to be computed according to the real Value of the Estate; and it is proved, that the Estate is worth much more than that Sum. And as his Lordship was of this Opinion, that the Plaintiff was no way intitled to have a Decree for a specifick Performance of the Agreement as against Mr. *Pulteney*, so he was of Opinion likewise, that as against him he could have no Relief for the 200 *l.* that he paid. But with regard to this last Matter the Plaintiff is intitled to a personal Decree out of Assets against the Administratrix of *York*. And so his Lordship was pleased to decree accordingly.

July 12. *The Dean and Chapter of Ely and Sir Simeon Steward.*

THE Dean and Chapter of *Ely* were Lords of the Manor of *Lakenheath* in the County of *Suffolk*, and Sir *Simeon Steward* and his Ancestors had been for two hundred Years together Lessees under them. Within this Manor there was a great Quantity of Fen Land, consisting of 3300 Acres, called *Stathold Fen*. The Lands leased to Sir *Simeon* and his Ancestors were constantly leased to them by two Indentures of the same Date; one of those Indentures

contained a Warren which lay in one Part of this Manor called the *Highlands*, and the other contained certain Lands which lay within the Fen. To these Lands there were Rights of Common belonging, extending partly over the Fen, partly over the *Highlands*. Besides these two Estates which Sir *Simeon*'s Family held of the Dean and Chapter, there were other Estates which they had, which lay within this Manor, of which they were seised in Fee, consisting partly of Freehold and partly of Copyhold; particularly they were seised of six Copyhold Tenements lying within the Fen, mix'd with the Fen Lands, which they held of the Dean and Chapter; and were likewise seised of Freehold Estates lying in the *Highlands*. To the Copyhold Lands they had Rights of Common extending over the Fen; and to the Freehold Lands Rights of Common extending over the *Highlands*.

In 1665 the Dean and Chapter had a Mind to inclose 600 Acres, Part of the Fen; and thereupon applied to the Commissioners of Sewers for Liberty for that Purpose. Sir *Nicholas Steward*, the Grandfather of Sir *Simeon*, opposed this Application of the Dean and Chapter. This occasioned a Stop being put to it for some Time; and thereupon, on the Ninth of *March* in that same Year, the Dean and Chapter came to an Agreement with Sir *Nicholas* to the following Effect; " That in Consideration of a Fine
" of 530 *l.* the Dean and Chapter agreed, that they would
" make Sir *Nicholas* a Lease of the Premises that he held
" of them for such three Lives as Sir *Nicholas* should nominate. That Sir *Nicholas* should, in *Easter* Week following, consent before the Commissioners of Sewers to
" the Passing of a Decree by them for the 600 Acres
" before-mentioned." And farther, " The Dean and Chapter agreed, that they would allow Sir *Nicholas* such a
" Proportion of the 600 Acres for his Sheep-Walk, with
" a Walk which he was intitled to upon the 600 Acres, as
" they should think fit; and Sir *Nicholas* was to deliver up
" a

“ a Deed of Purchase of the Leasehold Estate which he
“ obtained during the Usurpation.

This Agreement being thus entered into, Sir *Nicholas* consented to the Passing of the Decree. The Dean and Chapter thereupon had the 600 Acres allotted them, and a short Time after the Dean signed a Paper to the following Effect, “ That the Dean and Chapter would send him
“ over a Person to set him out 100 Acres, Part of the 600.” This being done, Sir *Nicholas* had Possession of the 100 Acres delivered to him accordingly; for these 100 Acres he and his Heirs paid a Rent of 50 s. *per Annum* to the present Time, to the Dean and Chapter; but no Lease was ever made to Sir *Nicholas* by the Dean and Chapter of these 100 Acres, nor was ever a Fine paid for them.

In 1666 another Dispute arose between the Dean and Chapter and Sir *Nicholas*, before the Commissioners; and then the Decree which was made was, that Sir *Nicholas* should have an Allotment of another 200 Acres, Part of the Fen in Severalty, in Satisfaction of his Common which he claimed in Respect of his Copyhold Tenements before-mentioned; and under that Decree those 200 Acres were constantly enjoyed by him. Sir *Nicholas* died, and in 1715 the Dean and Chapter renewed their Lease with Sir *Simeon Steward*, the Grandson of Sir *Nicholas*, for Twenty-one Years. This Lease was made by two Indentures in the same Manner that the former Leases were. And there was a Covenant in this Lease, as there was in all the former Leases, that at the End of the Term he should leave the same Quantity of live and dead Stock as he should receive; and that Stock was described by the Lease to be Sheep, Lambs and other Cattle; but the Fact was, that at the Time this Lease was renewed, he did receive no such live or dead Stock. In this Lease there was a Covenant likewise, that he should deliver to the Dean and Chapter a certain Number of Wethers every Year, at

14 *d.* a-piece, a certain Number of Rams at 12 *d.* and a certain Number of Lambs at 4 *d.* and this Covenant was likewise the same as had been inserted in all the former Leases.

In 1736 this Lease expired, and Sir *Simeon*, not agreeing with the Dean and Chapter about the Fine for the Renewal, quitted the Possession of the Premises contained in the Lease; but as some Disputes arose between the Dean and Chapter and Sir *Simeon*, concerning what the Lands were which he ought to have delivered the Possession of; and as the Dean and Chapter insisted, that they were intitled to have the Possession of the 100 Acres before-mentioned as well as of the rest; whereas Sir *Simeon* insisted, that he had a Right to them in Fee; and as other Disputes arose between them touching the Right of Common, which Sir *Simeon* claimed, and relating to the Breach of those Covenants that have been mentioned; thereupon the present Bill was brought by the Dean and Chapter against Sir *Simeon*, in order to have those Disputes determined.

Lord Chancellor said, That there was a great Deal of Obscurity in the present Case, by reason that the Dean and Chapter, in making their Leases, have adhered to the antient Descriptions in former Leases, without accommodating their Descriptions to the Change that their Lands have received by the Improvements that have been of their Estates. However it is incumbent upon this Court to make the best Determination they can in so dark an Affair. The first Question proper to be considered in the present Case is in respect of the Covenant entered into by the Defendant in 1715. whereby he agreed to leave the same live and dead Stock upon the Premises upon the Determination of this Lease, as he received at the Time of making his Lease, or to pay the Price of them. And the Point insisted on is, that the Court should make a Decree, that the Defendant should perform this Covenant specifically. The Stock is described by the Lease to consist of Sheep,

Y y

Lambs,

The Remedy on those Covenants in Leases whereby the Lessee agrees to do Things which were never in his Power to do.

Lambs, and other Cattle; and it is not to be controverted, but the Dean and Chapter have brought their Bill to have the Premises surrendered up to them, according to the Covenant in the Lease; but that can only be so far as the Nature of the Thing will allow of; and this Part of the Case relating to this Covenant is a very particular one. His Lordship said, he did not find that any Evidence was given, that at the Time of making this Lease there was any live or dead Stock upon the Premises belonging to the Plaintiffs, or that at the Time of making any of the former Leases there was any such Stock upon them; but it is insisted, that though no Evidence is given that there was any such Stock, yet that the Defendant by accepting the Lease by Indenture is concluded from saying, that there was no such Stock. The Fact it is probable was this. Before the Dissolution of Monasteries, the Possessions belonging to the present Dean and Chapter belonged to a Monastery, who possibly might choose to hold the Premises in their own Hands, or might not be able to let them without their furnishing a Stock upon them; that might give Rise to this Clause relating to the live and dead Stock being at first inserted in their Leases; and when these Lands came into the Hands of the Dean and Chapter, they being not by Statute allowed to make Leases of them without reserving the ancient Rent, that might give occasion to their Renewing of them in the same Form that they were at the Time they belonged to the Monastery; and in many of these Sort of Leases there are Descriptions of Buildings upon Lands, which at the Time of making those Leases had no Existence. But tho' there have been such Leases, wherein Covenants of that Kind have been inserted, yet that is not a Reason, that the Court should decree the Premises to be delivered up with such Buildings upon them. In the present Case, the Things contained in the Covenants are no Part of the real Estate of the Dean and Chapter's; therefore it is not to be contended, that they were so to go as to be a perpetual Maintenance for them; they are in the Nature of the Thing liable to be wasted.

Where the Court will not decree a specifick Execution of a Covenant in a Church Lease.

The only Point insisted on with regard to this Part of the Case is, that this Estate has been long in the Family of the Defendant, and that it is to be presumed, that at the Time they took these Leases at first, there was such Stock upon the Land; but though that possibly might be the Case, yet that is not a Reason for decreeing a specifick Execution of this Covenant in the present Case. Decrees for the specifick Execution of Agreements go upon quite different Foundations from those which Actions at Law do. Therefore the Rule relating to these Sort of Decrees is, that they are in the Discretion of the Court; and if any extraordinary Hardship or Difficulty attends them, the Court does not decree a specifick Performance of them; and was this Agreement to be carried into Execution in the present Case, great Hardships might attend it, and it might be almost impracticable to do it. The Hardship consists in what his Lordship had before-mentioned, and the Impracticableness consists in delivering Things of such Prices; Wethers are to be delivered at 14 *d.* a-piece, Rams at 12 *d.* and Lambs at 4 *d.* This shews, that with regard to this Part of the Case, the Bill must be dismiss'd without Prejudice to the Plaintiffs taking their Remedy at Law; but some other Parts of the Case are of a very different Consideration, they relate to the real Estate of the Dean and Chapter, which is proper for the Support of the Body. The first Part of this Estate relates to the 100 Acres, Part of the 600 Acres. And it is insisted on the Part of the Defendant, that this is Part of his Inheritance, and that he is not Lessee of those Lands under the Dean and Chapter. It has been said, that at the Time the 600 Acres were allotted to the Plaintiffs by the Decree of the Commissioners, the Ancestors of the Defendant had a Fee in a Fold-course and a Right of Common belonging to some Copyhold Tenements in the Fen; that these 100 Acres were given the Ancestors of the Defendant in Satisfaction of that Right; and that he is intitled to the same Estate in these 100 Acres as he had in the Right of Common. But his Lordship's Opinion was, that the Defendant was only intitled to

Where a Person's Interest in an Estate shall only be under a Lease, and not an Interest in Fee.

Constructi-
on of a De-
cree of Com-
missioners of
Sewers.

Constructi-
on of an A-
greement
made by a
Dean and
Chapter.

Where Per-
sons shall be
said to have
an Interest
in Land only
as a Church-
Lease, and

to those Lands, as Lessee under the Dean and Chapter. In 1665 the Dean and Chapter obtained of the Commissioners a Decree for the 600 Acres, of which the 100 Acres are Part; and his Lordship said, he would consider the Recital of that Decree, what it is which that Decree directs, and the Acts that have been done in Consequence of it. The Decree recites, that the Dean and Chapter had made Application to them to have an Allotment of 600 Acres of Land, in order to improve the same; and whereas Sir *Nicholas Steward*, and other the Inhabitants who had opposed the same, had now consented thereto, the Decree thereupon directs, that the Dean and Chapter shall have the 600 Acres allotted them, discharged of all Interest of Common or other Estates which they might claim in those Lands. Upon this Decree, had there been nothing more in the Case, the Plaintiffs would have had a manifest Title to the Lands in Question. But then the Defendant insists upon an Agreement enter'd into by the Dean and Chapter with Sir *Nicholas* on the 9th of *March* in that same Year. The Agreement is signed *Dean Wilford*. The Purport of the Agreement is; "It is agreed on Behalf of himself and
" the Chapter, that in Consideration of a Fine of 530 l.
" the Dean shall seal to Sir *Nicholas* two Indentures of
" Leases for three such Lives as Sir *Nicholas* shall nominate
" of the Lands which he had enjoyed as Lessee under
" them; that Sir *Nicholas* thereupon shall signify his Con-
" sent before the Commissioners to the Passing of the De-
" cree for the 600 Acres to the Dean and Chapter; and
" that the Dean and Chapter would allow him such a Pro-
" portion for his Sheep-Walk and Common as they should
" think it." And the Question is, Whether Sir *Nicholas* was to have them as Lessee under the Dean and Chapter, or as his Inheritance? And his Lordship's Opinion was, That he was to have them only as Lessee. All the rest of the Agreement relates to him as Tenant; he was to have a Lease of the Lands which he before enjoyed under them, and that Renewal was to be for three Lives. Sir *Nicholas* was con-

consenting to the Passing of the Decree for the 600 Acres to the Dean and Chapter, and they were to allow him such a Proportion of them for his Sheep-Walk and Common as they should think fit. Now had he claimed these 100 Acres in his own Right, 'tis very strange that the Agreement should be, that he should have such Part of the 600 Acres as they thought fit; this Expression shews, that the Meaning of the Agreement was, That whereas by the Dean and Chapter's inclosing 600 Acres, the Lease which was going to be renewed to Sir *Nicholas* would not be so beneficial to him, by reason that he would lose his Common upon those Acres which he used to have as Lessee, he should have the same Right in the Lands that they were to allot him, as he before had in the Common which he enjoy'd from them. Then comes the other Paper, signed by the same Dean; but that was no more than in Consequence of the former Agreement. However, it has been said, if the Family of Sir *Nicholas* were only Lessees of these 100 Acres, How comes it to pass, that they were never inserted in any Leases made by them? But his Lordship said, there not being any Leases made of these Acres at first, may be accounted for under that Agreement. Sir *Nicholas* was to have a Lease, for three Lives, of the Lands which he had all a long enjoy'd under the Dean and Chapter. And as they are only impower'd to make Leases for Twenty-one Years, possibly at first no Leases were made. Thus the Matter rested under this Agreement. But from the Nature of the Agreement, his Lordship said, the Construction of it, which he had mentioned, appears to be the real one. And that is supported from the Evidence, that from the Time of that Agreement the Family of Sir *Nicholas* has constantly pay'd to the Dean and Chapter a Rent of 50 s. *per Ann.* for the 100 Acres. For these Reasons his Lordship said, that he should decree the 100 Acres to be deliver'd up to the Plaintiffs. The next Question to be considered relates to the Right of Common claimed by the Defendant; and as to that his Lordship's Opinion was, that by the Decree

The Consequence of a Quantity of Land not being comprised in a Lease.

made by the Commissioners in 1666, the Defendant was only barred of the Right of Common that he claimed in the Fen, and not of the Right of Common that he claimed in the *Highlands*; the Commissioners by the Act of Parliament having no Authority to determine in relation to that. However, what the Nature of that Right of Common is, which the Defendant is intitled to in the *Highlands*, is a Matter upon the Proofs uncertain; for which Reason, as to that three Issues were directed. And so his Lordship was pleased to decree accordingly.

D E

Term. S. Michaelis

1740.

IN CURIA CANCELLARIÆ.

*Crop and Norton.**Novemb. 8.*

IN 1721 Colonel *Richard Norton* was in Possession of a Leasehold Estate holden of the Bishop of *Winchester*. Of that Leasehold Estate he was at that Time only seised to him and his Heirs, during his own Life; the two former Lives, which were inserted in that Lease, being then expired. On the 5th of *December* in that same Year, he writ a Letter to Colonel *Thomas Norton*, a Relation of his, persuading him to renew that Lease instead of himself, and said, that he should only desire that his Life should be continued in the Estate. That Letter had plainly a Reference to a former Discourse which had been upon that Subject between them, but what that Discourse was did not appear. On the 3d of *January* following another Letter was sent from Colonel *Richard Norton* to Colonel *Thomas Norton*, persuading him to do the same Thing; and on the 20th of that Instant, a third Letter passed to the like Effect. In that Letter, Notice was taken that Colonel *Richard Norton* had Writ a Letter upon the same Subject the Post before; but

no

no such Letter could now be produced. In one of these Letters there was this Expression, "You may hope to find much Favour from the present Bishop, and those after you." On the 13th of *August* 1722 a Surrender was made of this Lease by Colonel *Richard Norton* to the Bishop of *Winchester*, and on the same Day a new Lease was granted of the Premises by the Bishop to Colonel *Richard Norton*, and his Heirs, for three Lives. Colonel *Thomas Norton* paid the Fine to the Bishop for this Renewal, amounting to 1500 *l.* the Estates being about the Value of 400 *l. per Ann.* On the Day following Colonel *Richard Norton* executed a Deed Poll, declaring the Trust of the new Lease; and by this Deed the Trust was declared to be for the Benefit of himself for his Life, the Remainder in Trust for Colonel *Thomas Norton* for his Life, the Remainder in Trust for *Richard*, the only Son of Colonel *Thomas Norton*, which *Richard* was then but seven Years old; at the End of this Deed there was a Covenant, that on the Delivery up of this Deed, Colonel *Richard Norton* would give to Colonel *Thomas Norton*, and his Son, any other Security, for the Injoyment of the Premises after his Decease, as Counsel shall advise. To this Deed Colonel *Richard Norton* was the only Party, and Colonel *Thomas Norton*, as he swore by his Answer, was never made privy to it till the Death of Colonel *Richard Norton* in 1732.

On the Death of Colonel *Richard Norton*, Colonel *Thomas Norton* entered into Possession of this Estate; in 1734 he made a Mortgage of it to *Crop* for about 3700 *l.* In the same Year he borrowed a farther Sum of *Crop*, amounting to about 500 *l.* in order to get another Renewal of this Lease, one of the Lives being at that Time dropt. In that same Year this Renewal was accordingly obtained; the new Lease was made to continue during the three Lives of Colonel *Thomas Norton*, *Richard Norton* his Son, and *Crop*. But in order to obtain this Renewal, *Thistlethwaite*, who was the Heir at Law of Colonel *Richard Norton*, did not join in the Surrender of the old Lease,

Lease, that Surrender being made by Colonel *Thomas Norton* only.

In 1736 Colonel *Thomas Norton* wanted to sell the whole Interest in this Lease to *Crop*. Upon that occasion he delivered to *Crop* the Deed poll of the 14th of *August* 1722, which has been mention'd; and before that Time *Crop* had not any Notice of it. The Contract for the Purchase of this Estate proceeded; and the whole Purchase-Money, including what was already advanced by *Crop*, amounted to the Sum of 8200 *l*. This Contract for the Purchase rested only upon Articles, the Conveyance of this Estate being not executed, by Reason that *Richard Norton* the Younger insisted, that he should be intitled to it after the Death of his Father. The present Bill was thereupon brought by *Crop* against Colonel *Thomas Norton*, *Richard* his Son and *Thistlethwaite*, in order to compel Colonel *Thomas Norton* to go on with his Purchase, and that they might all join in the Conveyance. There was a Cross Bill brought by *Richard Norton* the Son against his Father and the other Parties to the former Bill, praying, that his Title might be established under the Deed poll of the 14th of *August* 1722, and that all the Deeds relating to this Estate might be brought before a Master for safe Custody, for the Benefit of the respective Parties.

Lord Chancellor said, That there were two Questions for his Consideration, the one arising upon the original Bill, the other upon the Cross Bill. The Question on the original Bill is, whether the Plaintiff is intitled to have a specifick Performance of the Articles. But that Question is to be thus understood, whether he is intitled to this Relief against Colonel *Thomas Norton*; for the Counsel for the Plaintiff have admitted at the Bar, that he cannot have such Decree against *Richard* the Son; and had it not been

Though the Party has only an equitable Title to an Estate, yet the Court will decree against him a specifick Performance of Covenants, equally as if he had a legal Title to the

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for

Estate. Where-ever it is impossible for the Party to perform his Covenant, the Court will not decree a specifick Performance of it.

Where a
Person shall
not be inti-
tled to the
whole Inte-
rest in a
Leasehold
Estate.

for the Cross Bill, the original Bill as against *Richard* the Son, his Lordship said, he would have dismissed at once; but as *Richard* the Son has brought his Cross Bill, whereby he insists, that he shall be intitled to this Estate after the Death of his Father, the Question on both Bills becomes proper to be considered with regard to him as well as with regard to the other Defendants. This general Question on the original Bill, namely, whether the Plaintiff is intitled to a Decree for a specifick Performance of Covenants, depends upon this, whether *Thomas Norton* is intitled to the whole Interest in this Leasehold Estate; because if it appears, that *Thomas Norton* is not so intitled, the Court will not decree a specifick Performance of Covenants against him. That would be for this Court to decree him to do an Impossibility, which in these Sort of Cases it will never do, but will leave the Party to his Remedy at Law. With regard to the Title of *Thomas*, it is admitted by the Counsel for the Plaintiff, that he is not intitled to the legal Interest; and if he has not the legal Interest in it, the next Question will be, whether or no he has the equitable one? If he has the equitable one, the Court will equally decree a specifick Performance of the Contract, as if he had the legal Interest in the Estate, by directing him to procure the Trustees to join in the Conveyance. The Question then will be, Whether he has such equitable Interest in the whole of this Estate, or not? That depends upon two Questions, one the Circumstances of the Transaction between Colonel *Richard Norton* and Colonel *Thomas Norton*, with regard to the Renewal of the Lease in 1722, and the Consequences arising from the Circumstances of that Transaction; the other the Deedpoll which was executed the Day after the Renewal. With Regard to the first of these Questions, the Case is to this Effect; Colonel *Richard Norton*, at the Time of the Renewal of this Lease, was the absolute Owner of the old one. 'Tis indeed true, that he had at that Time only his Life in that Estate. But this was a valuable Estate; for it is admitted, that it was between 400 and

500 l.

500 *l. per Annum*. And tho' there was but one Life subsisting in that Lease, yet he had a Power of renewing it. 'Tis indeed true, that he had not such a Right of Renewal, as that he could have compelled the Bishop to have renewed; but as between the Owner of the Estate and any other Person this Power of Renewal is considered as a Right and Interest. And that which shews that this Power of Renewal is considered a Right and Interest, is that when such Estate is renewed, the Trust of it shall be for the Benefit of those that had the antient Interest in the Estate. In the present Case, Colonel *Richard Norton* had this Right of Renewal in him. Colonel *Thomas Norton* was a Relation of his, and Colonel *Richard Norton* had a Kindness for him; Colonel *Richard Norton* was not desirous of renewing this Estate himself, but was willing that his Kinsman should have the Benefit of it. Accordingly he permits him to renew, the other paying the Fine, which amounted to 1500 *l.* What was the original Proposition between them does not appear, because no Witness is examined that gives Evidence of the Contents of it, and the Letters speak only of a Renewal in general. One of these Letters bears Date the 20th of *Jan.* 1721. and that Letter takes Notice of a former Letter being sent the Post before, but no such Letter is produced, the former Letter produced bearing Date the 3d of that Instant, which is seventeen Days before the other. But if all the Letters had been produced, 'tis not probable that they could have given a clear Account of the Agreement between the Parties relating to the Renewal. For the Letter of the 5th of *December* 1721, which was the first Letter that was wrote upon this Subject, takes up the Matter as a Thing that was known between them. All the Letters purport a Wish that Colonel *Thomas Norton* would come to an Agreement with the Bishop, and advise him not to miss it. And there is an Expression in one of the Letters, which may give some Light in so dark a Transaction concerning the Intent of the Parties, where the original Agreement between them cannot be known; and that is, " You may
" hope

As between the Owner of the Estate and any other Person, this Power of Renewal is considered as a Right and Interest.

When such Estate is renewed, the Trust of it shall be for the Benefit of those that had the antient Interest in the Estate.

The Consideration expressed for the Renewal of a Church-Lease, is usually nothing else but the Surrender of the former Lease.

A. is Owner of a Church-Lease, and there is one Life outstanding in it. *A.* consents that *B.* shall renew it, *B.* paying the Fine upon the Renewal.

The Lease is

renewed in the Name of *A.* and *B.* pays the Fine; there shall not be a resulting Trust upon this renewed Lease for the Benefit of *B.*

Where there shall not be a resulting Trust for the Benefit of him that pay'd the Purchase-Money, by reason that Part of the Consideration moved from him in whose Name the Conveyance was taken.

hope to find much Favour from the present Bishop, and those after you; which latter Words do seem to intimate as if some other Person was in the View of Colonel Richard Norton besides Colonel Thomas Norton. On the 13th of August 1722 the Lease is renewed. What is the Consideration of the Renewal express'd in the renewed Lease? Merely the Surrender of the former Lease. And in these Leases of Bishops or Colleges no other Consideration is usually expressed, though it is well known, that there is another Consideration in Fact, namely, the paying the Fine. The Fine in the present Case was indeed paid by Colonel Thomas Norton; but in Point of Law the whole Interest in this Lease was in Colonel Richard Norton. But it has been said at the Bar, and taken for granted, that though this was so, there would be a resulting Trust for the Benefit of Colonel Thomas Norton. But that his Lordship said he could by no Means agree to. And if that was the single Fact in the present Case, he should be of a different Opinion. The Ground upon which that Objection is founded is, that Colonel Thomas Norton pay'd the Fine. And it is indeed true, that where a Purchase is made of a Freehold Estate in the Name of one Man, and the Purchase-Money is pay'd by another, there shall be a resulting Trust for the Benefit of him who pays the Purchase-Money. But that is where the Whole of the Consideration for making the Conveyance passed from him who paid the Purchase-Money. And if that Rule of creating a resulting Trust should be extended where Part of the Consideration moved from him in whose Name the Conveyance was taken, all the Mischiefs would arise which the Statute of Frauds and Perjuries intended to prevent. Suppose two Persons were to purchase an Estate, and to club for the Consideration of it; suppose the Conveyance was taken in the Name of one of them only, and it should recite, that the Whole of

of the Purchase-Money was pay'd by the other, his Lordship said he did not know a Case wherein it was ever determined, that there could be a resulting Trust in Part of the Estate for the Benefit of the other. The present Case comes up to that. Here the Surrender of the old Lease was Part of the Consideration, and a very material Part of it for the granting of the new one. That Part of the Consideration moved from Colonel *Richard Norton*, in whose Name the renewed Lease is taken. And if the Matter had rested merely on this Part of the Case, it would have been far from clear, that here could have arisen a resulting Trust for the Benefit of Colonel *Thomas Norton*. The next Question proper to be consider'd in the present Case arises from the Deed Poll that has been mentioned. This Deed is all of it under the Hands of Colonel *Richard Norton*. This is a plain Declaration of Trust by a Trustee having the legal Estate in him, and consequently he had the Right to declare the Trust of it. It has been said, that he might have a Right to do this as against Colonel *Thomas Norton*, but not as between Colonel *Thomas Norton* and his Son. But there is no Ground for such a Distinction; for in all Cases he that has the legal Interest in an Estate is the proper Person to declare the Trust of it. It has been said, that this was a private Deed kept in the Closet of Colonel *Richard Norton*, and that it does not appear to have been ever deliver'd to Colonel *Thomas Norton*. And it is sworn by the Answer of Colonel *Thomas Norton*, that he was never made privy to this Deed till the Death of Colonel *Richard Norton*. This Part of the Answer has not been read, nor could it be read, by reason that it was not Evidence. But consider the Expression in this Deed; it declares, That the Intention of Colonel *Richard Norton* is and always was, that the said *Thomas Norton* and his said Son should succeed him in the Enjoyment of his *Alsford* Estate, and therefore for himself and his Heirs, &c. utterly renounces all Right to the Lease aforesaid, and does thereby give them, the said *Thomas Norton* and his Son successively and their Heirs, the abovesaid Lease, to be by them and every of them held,

B b b

possession

Where-ever Part of the Consideration moved from him in whose Name the Conveyance was taken, there shall not be a resulting Trust for the Benefit of him that pay'd the Purchase-Money.

The Surrender of an old Church-Lease is a material Part of the Consideration for the Granting of a new one.

The Power of declaring a Trust properly belongs to a Trustee.

possessed and enjoy'd, with all Right, Title, Profits, &c. thereto belonging, after his Decease. And at the End of this Deed there is a Covenant, that on the Delivery up of this Deed Colonel *Richard Norton* will give to Colonel *Thomas Norton* and his Son any other Security for the Enjoyment of the Premises after his Decease, as Counsel shall advise. This Clause at the End of the Deed imports, that the Deed was made with an Intention to be deliver'd to Colonel *Thomas Norton*; but whether it was in Fact delivered to him is not proved. It has been said; That if Colonel *Thomas Norton* was not intended to be the absolute Purchaser of this Lease for his own Benefit, after the Death of Colonel *Richard Norton*, it is extraordinary, that he should pay so large a Fine as 1500. But considering that it is his Son, who is the Gainer by this as well as himself, there is nothing extraordinary in that at all. Thus the Matter stands with regard to the Deed Poll of the 14th of *August* 1722. In 1734 this Lease is renewed again, one of the Lives upon it being then dropped. At the Time that Lease was made, *Thistlethwaite*, who was the Heir at Law to Colonel *Richard Norton*, did not join in the Surrender; and therefore whether that new Lease will be good in Point of Law the Parties ought to consider amongst themselves. From what has been said, the Consequence plainly is, that with regard to the original Bill it must be dismissed. The next Question arises upon the Cross Bill. That Bill prays, amongst other Things, that the Deeds relating to this Estate may be brought before a Master, in order to be made Use of for the Benefit of all Parties. With regard to this Part of the Case it is insisted on by *Crop*, that he is a Mortgagee upon this Estate, and that at the Time the Mortgage was made to him he had no Notice of the Deed-Poll of the 14th of *August* 1722. And it is indeed true, that it does not appear, that at that Time he had any Notice of this Deed. But then it is material to be observed, that it is not certain that he has the legal Estate in him, by reason that *Thistlethwaite* did not join in the Surrender of 1734. And though it has been said, that *Thistlethwaite* will

will be a Trustee for him under the Deed of the 14th of August 1722, yet, after the Death of Colonel Thomas Norton, that will not be so, in case the Surrender in 1734 be not a good one; for then he will be a Trustee for Richard Norton the Younger; the Rule being, that *qui prior est tempore potior est jure*. Upon the Whole, the proper Direction to be given will be, that all the Deeds be brought before the Master for the Benefit of all Parties. And so his Lordship was pleased to decree accordingly.

Fleetwood and Templeman.

Novemb. 10.

J. C. 2. 11. 74.
IN 1692 ----- Saunders and Mary his Wife made a Mortgage of an Estate, whereof the Husband was seised in the Right of his Wife, for 785 l. And in that Deed of Mortgage there was a Covenant on the Part of the Husband and Wife, that they would, on or before Easter Term then next ensuing, levy a Fine of the Premises for securing the Title of the Mortgagee. In the Trinity Term following, and not before, the Fine was levied. This Mortgage was soon after assigned to Templeman for a valuable Consideration. Afterwards, in August 1695, Saunders and his Wife executed a Deed, whereby, in Consideration of about 10 l. they released to Templeman their Equity of Redemption, the Estate being at that Time but 40 l. per Ann. And in the same Deed there was a Covenant on the Part of Saunders and his Wife, that the Fine which they had heretofore levied should be for the strengthening this Deed. Templeman enter'd into the Possession of this Estate, and laid out upon it pretty large Sums of Money; so that by Improvements it was now of the Value of 56 l. per Ann. In 1718 Saunders the Husband died, Mary the Wife survived. In 1727 she died, and then her Heir executed a Conveyance to Fleetwood, whereby he sold to him all his Interest in this Estate. The Consideration Money mentioned in this Deed was 81 l. One of the subscribing Witnesses to this Conveyance swore, that at the Time of the Execution

cution of it, he saw Gold paid down and that afterwards he heard the Party, who executed it, acknowledge that he received the whole 81 l.

In 1737 the present Bill was brought by *Fleetwood* against the Defendant, in order to redeem this Estate.

Lord Chancellor said his Opinion was, that there was no ground for the Relief which the Plaintiff sought by his Bill. This is a Bill which is brought by a Purchaser of an Equity of Redemption, supposed to be out-standing upon a Mortgage made in 1692. The Purchase was made in 1735, of one who was never in Possession, and whose Ancestors had not been in Possession for a great Number of Years. The Nature of the Fact was in this Manner; In 1692, a Mortgage was made by a Husband and Wife for 785 l. In this Mortgage there was a Covenant on the Part of the Husband and Wife, to levy a Fine of the Premises on or before *Easter* Term then next following, in order to secure the Title of the Mortgagee. The Fine was not levied by that Time, but was levied in *Trinity* Term following. *Templeman* takes an Assignment of this Mortgage, and in 1695 purchases a Release of the Equity of Redemption from the Husband and Wife. And in that Deed there is a Covenant on the Part of the Husband and Wife, that the Fine before levied should be for the Strengthening this Deed. His Lordship said, he inclined to think in Point of Law, that as the Fine was not levied by the Time in which it was covenanted to be levied, the Fine could not operate to strengthen the Deed of Mortgage, but that it well might operate to strengthen the Deed of 1695, and that that subsequent Deed might well declare the Uses of that Fine. The Case of *Jones and Morley* in the King's Bench, the Beginning of King *William's*

Where a subsequent Deed may declare the Uses of a Fine.

A Deed is made and a Covenant therein inserted to levy a Fine the *Easter*-Term fol-

lowing, in order for the Strengthening that Deed. The Fine is not levied in that Term, but is levied the *Trinity* Term after. Two Years after another Deed is made, and a Covenant therein inserted, that the Fine shall be and enure to the Uses of the second Deed. Lord Chancellor inclined to think, that the Fine should enure to the Uses of the second Deed, and not to the Uses of the first.

liam's Time, he believ'd was to that Purpose. If this was so, it makes an End of the present Question by shewing, that the Ancestor of the Defendant was a Purchaser of the Inheritance of this Estate. However, his Lordship said, he would not determine the present Question merely on this Point of Law, but upon the whole Circumstances of the Case. Suppose the Defendant was only the Representative of a Mortgagee; there were strong Objections against the Plaintiff's being allowed to redeem him after so great a Length of Time. The Plaintiff has by no Means given a clear Proof even of his paying the Consideration of his Purchase. It is indeed true, that one of the subscribing Witnesses says, that he saw Gold paid at the Time of the Execution of the Deed, and that after the Execution of it he heard the Vendor acknowledge, that he had receiv'd his Purchase-Money; but this is not such a sufficient Proof of the Payment of the Consideration-Money in a Deed as might have been expected. For these and some other Reasons his Lordship's Opinion was, that the Bill ought to be dismissed with Costs; and so his Lordship was pleased to decree accordingly.

Where a Person shall not be allowed to redeem an Estate by Reason of the Length of Time.

What shall not be said to be a clear Proof of the Payment of the Purchase-Money of an Estate.

Martin and Savage.

Novemb. 22.

J. C. Rodwell, M. P. R. 22. 1727.

IN 1721 *Isaac Wells* made his Will, and thereby devised all his real Estate to *Sarah*, the Wife of *Charles Savage*, who was one of his Sisters, subject nevertheless to the Payment of 300 *l.* to *Elizabeth*, the Wife of *Roger Martin*, who was his other Sister. In 1725 he intermarried with *Elizabeth*, the Daughter of ——— *Sanford*. Upon that Marriage he made a Settlement, whereby the Estate, which was before comprised in the Will, was settled upon himself for Life, the Remainder to his Wife for Life, the Remainder to Trustees for 300 Years, the Remainder to their first and other Sons in Tail Male, the Remainder to their Daughters, and the Heirs of their Bodies, as Tenants in Common, the Remainder to *Charles Savage* before-men-

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tioned, and to *Phips*, as Trustees for a Term of 400 Years, the Remainder to his own right Heirs. The Trust of the first Term was declared to be for the raising Portions for younger Children; the Trust of the second Term was declared to be for the raising 200 *l.* to be disposed of by *Elizabeth* his Wife, in such Manner as she should appoint. *Elizabeth* made her Will, and thereby bequeathed certain Shares in the 200 *l.* to particular Legatees; the rest of it she bequeathed to *John Sanford*, whom she made her Executor. Soon after she died without Issue. *John Sanford* was at that Time an Infant, and still continued to be so; whereupon Administration during his Minority was granted to his Father *Robert Sanford*. After the Death of *Elizabeth Wells*, *Isaac* her Husband declared, in the Presence of one Witness, that the Will that he made in 1721 should stand. After this *Isaac* himself died; upon his Death *Charles Savage* entred into Possession of the real Estate of *Isaac Wells*, as one of the Trustees of the Term of 400 Years, and insisted likewise, that his Wife was intitled to the Inheritance of it, under the Will of 1721; this Claim of the Inheritance he made to *Roger Martin* and *Elizabeth* his Wife, at the Time he entred into the Estate; but at the same Time told them, that he was willing to pay them the 300 *l.* devised to *Elizabeth Martin* by the Will of *Isaac Wells*, upon Terms that they would join in a Mortgage for the raising this Sum of 300 *l.* upon the Estate; that she would join in a Fine for that Purpose, and by that Fine would release all Right and Title to the Estate. *Roger Martin* and *Elizabeth* his Wife agreed, that they would do so. Accordingly in *Hillary Term* 1737 a Fine was levied of the Premises by *Roger Martin* and *Elizabeth* his Wife, to *Charles Savage* and *Sarah* his Wife.

On the 7th of *November* following, a Deed of Mortgage was made of the Premises, wherein *Elizabeth Martin* joined. And by Indentures of Lease and Release, dated the 8th and 9th of that Instant, executed by *Elizabeth Martin*, she declared the Uses of the Fine to be for barring

her Right in the Premises; but *Roger* her Husband refused to make himself a Party to those Deeds.

The present Bill was brought by *Roger Martin* and *Elizabeth* his Wife against *Charles Savage* and *Sarah* his Wife, *Phips*, *John Sanford* and *Robert* his Father, praying that *Charles Savage* and *Phips* might raise the Sum of 200*l.* for the Benefit of *John Sanford* and the other Legatees mentioned in the Will of *Elizabeth Wells*; that *Charles* and *Sarah Savage* might come to an Account with the Plaintiffs for a Moiety of the Profits of this Estate, and that a Partition might be made between the Plaintiffs and *Charles* and *Sarah Savage*.

Lord Chancellor said, that undoubtedly a Declaration of Uses by the Husband alone is good of a Fine levied by Husband and Wife, and he would not determine, that on such Fine a Declaration of Uses by the Wife alone is void. In the Case cited by the Counsel out of *Coke's Reports*, the Husband and Wife declared different Uses of the Fine, contradictory one to the other, and both were held to be void. If the Wife had levied the Fine alone in the present Case, to be sure the Declaration of Uses by her only would not have been good. But in the present Case the Husband and Wife joined in the Fine, and it would be hard to say, that the Declaration of Uses by the Wife alone should not prevail. However, if the present Case had rested merely upon this, his Lordship said, he would have put it into another Method of Inquiry. But now it appears, that the Plaintiff has a proper Ground of Relief, and that on the Head of Mistake. Here was a Will made by *Isaac Wells* in 1721, by which the Estate was given indeed to *Sarah*, the Wife of *Charles Savage*; but that Will

If Husband and Wife join in a Fine, and declare the Uses of it contrary one to the other, neither of those Declarations of Uses shall stand.

Husband and Wife join in a Fine, and the Wife alone declares the Uses of it, how far such Declaration of the Uses will be good.

If the Husband alone declares the Uses of a Fine levied by himself

and his Wife, and there be no other Declaration of Uses, such Declaration of Uses should be good. If a Fine be levied by a Wife without her Husband, her Declaration alone of the Uses will not be good.

A Man by his Will gives his Estate in Fee to one of his Sisters. After this he makes a Marriage-Settlement, wherein he limits the Estate in strict Settlement, though the Remainder is limited to his own right Heirs, yet that Settlement shall be a Revocation of the whole Devise to the Sister.

If a Will
devising a
Freehold E-
state is only
republished
in the Pre-
sence of one
Witness,
such Repub-
lication is
not good.

was revoked by the Settlement afterwards made in 1725. It is indeed true, that this Will was republished; but that Republication being only in the Presence of one Witness could signify nothing. Here then, in Reality, was no Will in Being at the Time the Parties came to the Agreement among themselves about levying a Fine of this Estate. That Agreement was founded upon a Mistake, the Parties taking it for granted, that there was a Will in Being giving the Estate to the Wife of *Savage*, when there was none. For which Reason the Acts done under that Agreement must be set aside, as being founded upon a Mistake; and consequently the Wife of the Plaintiff must be intitled to a Moiety of this Estate, and a Partition must be made of it in the same Manner as if no such Agreement had been made. And so his Lordship was pleased to decree accordingly.

Novemb. 28.

Jessup and Duport.

THE Bill charged, That *Duport* was the Owner of a Plantation in *St. Christophers*; and that in 1738 *Bunnyo* was the Tenant of it, under a Lease which was to expire in that same Year. The Bill farther charged, That in the Month of *April* in that Year, two Persons living in *England*, who were Agents for *Jessup*, who lived at *St. Christophers*, enter'd into a Contract with *Duport* to the following Effect. "That *Jessup* should take a Lease of
" the Premises within six Months after the Contract; and
" that if he did not, he should forfeit to *Duport* twenty-
" five Gallons of Rum, to be delivered within one Month
" after the six Months expired." The Bill charged, That *Jessup* did not indeed offer to accept the Lease within the six Months mentioned in the Contract, but that he did offer to accept it in *August* 1739, and that he wrote a Letter to his two Agents before the six Months expired, declaring to them, that he would accept of the Lease according to the Contract. The Bill charged, that *Jessup*
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all along intended to accept the Lease, and that he provided a Stock for that Purpose; but that notwithstanding this Contract *Duport* came afterwards to an Agreement with *Bunnyo*, that *Bunnyo* should hold over the Premises; and thereupon the present Bill was brought by *Jessup* against *Duport* and *Bunnyo*, in order to have a specifick Performance of the Contract which *Duport* entered into with the two Agents of *Jessup*.

To this Bill *Duport* and *Bunnyo* put in their Answers, and thereby admitted the Contract; but insisted, that as *Jessup* lay by so long before he offer'd to accept the Lease, he ought not now to be allowed to require it.

These Answers being come in, the Plaintiff's Solicitor preferred a Petition to the *Master of the Rolls*, praying, That the Plaintiff might have Liberty to have a Commission to examine his Witnesses at *St. Christophers*; and to this Petition an Affidavit was annexed, made by the Solicitor in this general Manner, that such Commission was necessary. Upon this Petition and Affidavit annexed his Honour was pleased to order, that *Duport* should have such Commission.

It was now mov'd, that that Order might be discharged, and chiefly for this Reason, Because the Affidavit had not specified any particular Reason why such Commission was necessary.

Lord Chancellor said his Opinion was, That the Order ought not to be discharged. The Ground for granting a Commission beyond Sea to examine Witnesses must depend upon the special Circumstances of the Case; those Circumstances may be disclosed upon Affidavit, or else they may arise from the Nature of the Case it self. In the present Case, had the Matter rested merely upon the Affidavit, his

The Ground for granting a Commission beyond Sea to examine Witnesses must depend upon the special Circumstances of the Case.

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Where there shall be said to be sufficient Circumstances arising from the Nature of the Case, upon which a Commission for examining Witnesses beyond Sea ought to be granted.

The Circumstances on which a Commission may be granted to examine Witnesses beyond Sea, may either be disclosed upon Affidavit, or else they may arise from the Nature of the Case itself.

An Affidavit made by a Solicitor in this general Manner, that a Commission to examine Witnesses beyond Sea is necessary in the Cause, is not sufficient to intitle the Party to such Commission. And if the Ground for granting such Commission arises upon the Affidavit, it ought to specify to the Court the Reasons why such Commission is necessary.

On Application for a Commission to examine Witnesses be-

Lordship said, he should have been of Opinion, that there were not Circumstances disclosed in it sufficient to warrant the granting such Commission upon it, because it is an Affidavit of the Solicitor, swearing only in general, that such Commission is necessary, without laying before the Court the Reasons why it is so. The Solicitor by this Means takes upon himself to judge of a Matter that does not belong to him. But though the Affidavit is not sufficient, yet there are Circumstances arising from the Nature of the present Transaction, by which it does appear, that such Commission is necessary. This is a Bill that is brought in order to have a specifick Performance of an Agreement; and in every Bill of that Sort it is in the Discretion of the Court whether they will decree a Performance of it or not. The Decreeing such Performance depends upon the Circumstances of the Case, and does not arise merely upon the Face of the Agreement; the Consequence of which is, that in the present Cause these Circumstances must be inquired into; but many of them arise beyond Sea. It will be material, at the Hearing of the Cause, to be consider'd, whether the Delay of the Plaintiff, in not taking the Lease at the Time agreed upon, was a Prejudice to *Duport* one of the Defendants. Other Circumstances of the same Kind will then be proper to be consider'd, which arose beyond Sea. And as on the one Hand it must not be laid down, that the Granting such Commission is a Motion of Course; so on the other Hand it must not be laid down, that the Party applying for such Commission must shew, that there is an absolute Necessity for it. Was that the Case on Motions of this Sort, the Court must be obliged to determine the Merits of the Cause; whereas in Cases of this Sort it is sufficient to shew, that there is a probable Cause for the granting such Commission; and such probable Cause does appear to be in the present Case. And so his Lordship was pleased to order accordingly.

it is sufficient to shew, that there is probable Cause for the granting such Commission.

Hodgson and Buffy.

Decemb. 5.

J. C. Idrell v. R. v. 2. & 2. M. 29.

After the Marriage of *Edward Buffy* with *Grace* his Wife, he made a voluntary Settlement of a reversionary Term to Trustees, in Trust to permit and suffer *Grace* to enjoy the Profits thereof for her better Support during the Term, if she should so long live; and from and after her Decease to permit *Edward* to enjoy the Profits thereof during the Remainder of the Term, if he should so long live; and after his Decease in Trust for the Heirs of the Body of *Grace* by *Edward* begotten, their Executors, Administrators and Assigns; and for want of such Issue the Remainder in Trust for *Henrietta Hodgson* during the Remainder of the Term, if she should so long live; and after her Decease in Trust for her two Sons *William* and *Edward Hodgson, &c.* After the making this Settlement *Edward Buffy* died, having never had any Issue; *Grace* his Wife survived him.

The present Bill was brought by *Henrietta Hodgson* and her Husband, and likewise by *Edward* their Infant Son, against *Grace Buffy* and the Trustees, in order to have the Deeds and Writings relating to this Term brought into Court, to be deposited there for the Benefit of all Parties that should have an Interest in it.

Grace Buffy insisted by her Answer, That she was become intitled to the whole Benefit of the Term. This Cause came on to be heard in the last Term.

Lord Chancellor thought it at that Time a Matter of some Difficulty, and order'd it to stand for Judgment as of to Day; and now his Lordship was pleased to deliver his Opinion in it. He said, The general Question is, Whether the Plaintiffs are intitled to have the Deeds and Writings relating to this Term brought into Court for the Benefit of
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all Parties that shall have an Interest in it? And that Question depends upon this, Whether the Plaintiffs have any Interest in this Term or not? To shew that they have not any Interest in it, the great Objection made on the Part of the Defendant *Grace Bussy* is, that the Limitation over, under which the Plaintiffs claim, is too remote to be allowed of. Two Arguments have been offered in order to support this Objection; one, that as the Deed is penned, the Trust of the Term was to vest, not in the Issue of *Grace* as Purchasers, but in *Grace* herself only; the other, supposing the Issue were intended to be Purchasers, yet if there had been Heirs of the Body of *Grace*, they would have taken the whole Benefit of the Remainder of the Term; so that in that Case the Plaintiffs could have taken nothing; and though the Fact has happen'd, that there was no Issue, yet that Event cannot vary the Case. With regard to the first of these Arguments his Lordship said his Opinion was, that the Heirs of the Body were intended to take as Purchasers, and consequently that the whole Interest was not designed to vest in *Grace Bussy* the Defendant. It has been admitted at the Bar, that the Words *Heirs of the Body*, or *Issue* may be Words of Purchase; *Archer's Case* in *Coke's Reports* is a strong Authority for that Purpose; and so is the Case of *Lisle* and *Gray*, reported in *Sir Thomas Jones* 114. 2 *Lev.* 223, and *Raymond* 278. And though there is a Difference in the Reports of that Case, whether that Judgment was affirmed in the Exchequer Chamber or not; yet in the Certificate of the Judges, made in the Case of *Legate* and *Sewel*, Mr. Justice *Tracy* takes Notice, that he had looked into the Record of that Case, and found, that the Judgment was affirmed. In these two Cases the Interest in Question was a legal Inheritance, wherein the Words *Heirs of the Body* were construed to be Words of Purchase, and in the last of them these Words were inserted in a Deed. Now if these Words have been construed to be Words of Purchase in the Case of legal Inheritances, which properly admit of Limitations in Tail, no Wonder is it, that these Words should receive such Construction in the

In the Case of a Deed the Words *Heirs of the Body* shall be construed Words of Purchase, where the Intent of the Deed plainly was, that they should be so.

Where the Intent of a Deed shall be to make a Man's Heirs of his Body Purchasers of the remaining Interest in a Term.

How far the Trust of a Term may be limited by Deed.

Cafe of Terms for Years, which do not properly admit of such Limitations. Several Cafes have been cited by the Counsel for the Plaintiffs, to shew that the Words *Heirs of the Body* ought to receive this Construction in the present Cafe; particularly the Cafe of *Peacock and Spooner, Daffern and Goodman*, and that of *Webb and Webb*, all reported in *2 Vern.* But the Cafe of *Webb and Webb* is more fully reported in *Williams, Vol. 1.* There has been another Cafe cited to the same Purpose, which was that of *Don and Merrifield*, heard at the *Rolls* the 27th of *October*, the 4th of his present Majesty; there the Words in a Will were to this Effect. “*Item, All other my Leasehold Estates I devise to the following Uses. To the Use of C. for Life, the Remainder to my Brother S. for Life, the Remainder to the Heirs of the Body of my Brother S. and their Executors and Assigns.*” It is indeed true, that the only Thing directed by the Decree was, that there should be an Issue to try the Validity of the Deed, under which the Testator claimed. But it would have been to no Purpose to have directed that Issue, unless the Court had been of Opinion, that the Limitation over to the Heirs of the Body was good by way of Purchase. These Cafes relating to the Trust of Terms, wherein the Words *Heirs of the Body* have received this Construction of being Words of Purchase, have been founded on the manifest and apparent Intent of the Parties, that the Words should receive this Construction. It has been said indeed, that these Cafes have only arisen on Marriage Settlements or Wills, and that in these Cafes a greater Latitude of Construction ought to be allowed of than in the present one. With regard to the Cafe of Wills the Authority of *Lisle and Gray*, which has been cited, is a clear Answer to it. For that shews, that even in the Cafe of a Deed the Words *Heirs of the Body* shall be construed Words of Purchase, where the Intent of the Deed plainly was, that they should be so. As to the Cafe of Marriage Settlements the Objection indeed there is of more Weight; but there the Reason is, that the Construction of Marriage Settlements and Marriage Provisions (which are

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the Cases of *Peacock* and *Spooner*, *Daffern* and *Goodman*, and that of *Webb* and *Webb*) all depend upon the Intention of the Parties appearing in the Deed; and if that had not been the Ground of those Resolutions, the Foundation of them must have failed. And in voluntary Assignments of Terms, if the Intention of the Parties clearly appears, the Intention ought to prevail. And there is no other Difference between Marriage Settlements or Marriage Provisions made upon a valuable Consideration and voluntary Assignments of Terms, than that in the first Case the Court will sometimes make a stronger and more favourable Construction to answer that Intention, than they will in the other. But if the Intention of the Parties manifestly appears in the latter Case, the Instrument shall be construed according to that Intention as well as in the former. The Question then in the present Case is, whether the Intent of the Parties does require, that the Deed should receive this Construction, that the Words *Heirs of the Body* should be Words of Purchase? And his Lordship's Opinion was, that it did. It requires this more strongly than in any one of the printed Cases that have been cited. The Limitation to the Heirs of the Body ought to be construed here in the same Manner as if the first Limitation had been to the Wife for Life only. The Estate is given to the Trustees, in Trust to permit and suffer *Grace* to enjoy the Profits thereof for her better Support during the Term, if she should so long live. These affirmative Words imply a Negative, that *Grace Bussy* was not to have the Profits any longer than for her Life. And where the Words are any Thing to that Import, implying a Negative, that the first Taker was to have no more than an Estate for Life, that has been held to be a Reason for making the Words *Heirs of the Body* to be Words of Purchase. To this Purpose there is a Case cited by Lord *Hale*, in the Case of *King* and *Melling*, where the Words were *Et non aliter*. And to the like Purpose was the Case of *Bacchus* and *Wells*, *Hill. 12.* of the late Queen. The next Set of Words, from which an Argument may be drawn to shew this

this Intent in the present Case, are the Words of the very Limitation itself to the Heirs of the Body. That Limitation is in Trust for the Heirs of the Body of *Grace*, by *Edward* begotten, their Executors, Administrators and Assigns. These Words are a Declaration of the Intention of the Party, that the Executors of the Heirs of the Body should take this Term, and that the Executors of the Wife should not; and it amounts to an express Declaration to vest the whole Property of the Remainder of the Term in the Heirs of the Body; and that it should not be in *Grace*. This Clause is likewise a Proof, that the Intention of the Parties was not, that the Term should go to all the Heirs of the Body in Succession, but that it should vest in one of them only, that it should go to his personal Representatives, and that it should not go to any other Heirs of the Body. The Reason why the Words *Heirs of the Body* have in other Cases been construed to give the whole Term to the first Taker is, that under these Words the Intent of the Party appears, that all the Heirs of the Body should take *in infinitum*. But in the present Case such an Intention is excluded by Reason of the Word *Executors*. With Regard to the second Argument made Use of in Support of the Objection that has been mentioned, his Lordship's Opinion was, that under the Event that has happened of there being no Issue of the Body of *Grace Bussy*, by *Edward* begotten, the Plaintiffs are well intitled to the Benefit of the Remainder. There is no Danger in this Case of a Perpetuity. The Event of there being Issue, or not, must be known within ten Months after the Life in Being. The allowing such a Remainder as this to be good, under such a Contingency as this, is agreeable to the Cases of *Stanley and Lee*, *Sabarton and Sabarton*, *Luson and Grosvenor*, and that of *Higgins and Derby*, reported in *Salkeld*; and so his Lordship was pleased to decree accordingly.

When ever the Remainder of a Term is limited to a Person's Heirs of his Body, their Executors and Administrators, that is a Reason for construing the Words *Heirs of the Body* to be Words of Purchase.

When ever the Remainder of a Term is limited to the Heirs of the Body of a Person, their Executors, Administrators, it shall not go to all the Heirs of a Body successively one after another, but only to one of them, and his personal Representatives.

Where a Person may take Benefit of the Limitation over of a Term by Reason of a subsequent Event of there being no Issue.

*Decemb. 5.**Bourne and Dodson.*

PEELE, who was a Merchant trading to *New England*, at different Times borrowed several Sums of Money of *Dodson*. On the 27th of *September* 1732, the Securities for those Sums of Money were cancelled, and one Bond and Warrant of Attorney to confess a Judgment were given in the Room of them for 5050 *l.* On the 2d of *October* following *Peele* made an Assignment to *Dodson* of a certain Part of his Effects, by Way of Security for 3750 *l.* On the 10th of *January* following there was an Indorsement made on the Back of that Deed, that it should stand as a Security for 9350 *l.* And at the same Time it was agreed, that it should farther stand as a Security for 1000 *l.* more, if that Sum should afterwards be advanced. On the 21st of *April* 1733 a *Memorandum* was made, that that Sum was advanced accordingly. On the 1st of *June* following another Assignment was made by Way of Security for 1776 *l.* In *May* 1734 these Securities were cancelled, and a new Assignment made by Way of Security for 10,500 *l.* to carry Interest from the *December* following. This Assignment contained, amongst other Things, two Ships and some other Effects belonging to *Peele*, which were all of them then in *New England*. *Dodson* swore by his Answer, that the Sum of 10,500 *l.* was made up in the Manner following; 10,000 *l.* Part thereof was due, as he swore, the *December* precedent; at the Time of executing the Deed there was 250 *l.* due for Interest, and the remaining Part of the Sum was made up of Interest computed to be due the *December* following. His Answer indeed was not very clear in setting out the Consideration of this Deed to have arose in this Manner; but this was the most natural Construction of the Answer that could well be made. However, upon the Face of the Deed it was said to be made in Consideration of 10,500 *l.* then in Hand paid, and there was a Receipt on
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the Back of the Deed, purporting that that Sum was then received. On this Deed there was an Indorsement of there being 800 *l.* more advanced; *Grew* and *Harrison* were the subscribing Witnesses to this Deed, and likewise to the former Securities. *Harrison* was dead at the Time that the present Suit was commenced. *Grew* was examined in Relation to the Consideration of these several Deeds. Upon his Examination he swore, that he remembered particularly, that at the Time the Deed of *Octob.* 1732 was made, at the Time the Deed of *April* 1733 was made, and at the Time the last mentioned Deed of *May* 1734 was made, *Peele* acknowledged the Receipt of all the several Sums for which those Deeds were made a Security. In 1734 one of the Ships returned home, and in *December* following the other Ship did so likewise. As soon as these Ships were so returned, *Dodson* gave a Letter of Attorney to *Peele*, empowering him to dispose of the Effects that were on board these Ships, for the Benefit of *Dodson*; and *Peele* agreed by the same Instrument, that he would account to *Dodson* accordingly. Under this Letter of Attorney, *Peele* all along acted as if he was the Owner of the Ships and Cargo. A Servant of *Peele*'s was examined in this Cause, and he swore that on the 14th of *February* 1734 *Peele* left his House, and never returned again; on the 15th of that Instant *Peele* went to the House of *Latham*, and told him he was forced to hide, and desired him to carry two Bank-Notes of 400 *l.* each to *Dodson*, towards Payment of Part of his Debts. On the 17th of that Instant *Latham* carried the Notes to *Dodson*. But it did not appear, that *Dodson*, at the Time he received them, had any Notice that *Peele* was become a Bankrupt.

The present Bill was brought by the Assignees under the Commission of Bankruptcy against *Dodson* and *Peele*, praying that the Deed of *May* 1734 might be set aside as being void against the Plaintiffs, or at least that it might only stand as a Security for so much Money as should appear to be *bona fide* advanced.

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What Assignment made by a Person before his Bankruptcy is not void by 21 Jac. c. 19. sec. 10, 11. tho' he continued in the Possession of the Goods to the Time of his Bankruptcy.

Lord Chancellor said, there were three Questions in the present Case proper for his Consideration. 1st, Whether that Part of the Assignment of May 1734, which related to the Ships, is not void by the Statute of 21 Jac. c. 19. sec. 10, 11? 2dly, Supposing the Whole of the Assignment is good in Point of Law notwithstanding that Statute, for what Sums that Assignment shall stand a Security? And 3dly, Whether *Dodson* is intitled to the Bank-Notes that were sent to him? With regard to the first of these Questions, his Lordship said it was a Point of great Consequence, and he did not remember any one Case that was ever determined upon that Statute. The only Case that has been cited by the Counsel, was that of *Stephens and Soale*, determined by Lord *Talbot*. The Words of the Act are, "And for that it often falls out, that many Persons before they become Bankrupts do convey their Goods to other Men upon good Consideration, yet still do keep the same, and are reputed the Owners thereof, and dispose of the same as their own, be it enacted, That if at any Time hereafter any Person or Persons shall become Bankrupt, and at such Time as they shall become Bankrupt shall, by the Consent and Permission of the true Owner and Proprietor, have in their Possession, Order and Disposition, any Goods or Chattels whereof they shall be reputed Owners, and take upon them the Sale, Alteration or Disposition as Owners, that in every such Case the Commissioners, or the greater Part of them, shall have Power to sell and dispose the same to and for the Benefit of the Creditors which shall seek Relief by the Commission, as fully as any other Part of the Estate of the Bankrupt." It has been insisted, that an Assignment by Way of Mortgage is within the Meaning of this Clause of the Act. But his Lordship said he very much doubted whether it was. The Words of the Recital are, "For that it often falls out that many Persons before they become Bankrupts, do convey their Goods to other Men." And it has been truly

truly observed at the Bar, that these Words rather seem to import an absolute Assignment than an Assignment by way of Mortgage. A Mortgage in this Court is considered merely as a Pledge; and the enacting Clause speaks of the Bankrupt's retaining the Possession of the Goods with the Consent of the Proprietary. Who is the Proprietary? Is it the Pawnor or the Pawnee? In Consideration of this Court it must be the Pawnor. The other has only a special Property for a particular Purpose, subject to a Redemption. So even at Law, the Person that pledges Goods is considered as having the absolute Property. If these Things are so, *Peele* in the present Case must be considered as the Owner of the Ships himself, and he enjoyed the Possession of them by the Consent of another, who had only a special Property in them. Was that the true Construction of the Act which is contended for on the Part of the Plaintiffs, the Question must often have been determined in their Favour. For nothing is more common than to make Securities of Ships, and notwithstanding that, for the Party making the Security, to retain the Possession of them. So likewise Bills of Sale are often made of Goods beyond Sea, and yet the Possession of those Goods continues in the Hands of their Factors. In *Trinity Vacation 1725* there was the Case of *Jacob and Shephard* to the following Effect. That was a Bill brought by Assignees under a Commission of Bankruptcy, to set aside a Deed on the Head of Fraud, which was executed by the Bankrupt. The Fact of that Case was to the following Effect. *Lee*, a short Time before his Bankruptcy, made a Bill of Sale of Part of his Effects to two or three of his Creditors, in Trust that out of the Money arising therefrom they should pay themselves, and such other Creditors as *Lee* should appoint. A Bill was brought in order to set aside this Bill of Sale. Two Questions there arose; one, Whether the Deed could be set aside on the Head of actual Fraud? the other, supposing there was not actual Fraud, Whether

Where Equity shall not interpose to set aside a Deed executed by a Person before his committing an Act of Bankruptcy.

Where a Deed executed by a Person before he commits an Act of Bankruptcy shall not be said to be fraudulent against his Creditors.

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Where a Deed made by a Person of a great Part of his Effects, in order to give a Preference to some of his Creditors before others of them, shall be said to amount to an Act of Bankruptcy.

it could not be set aside on the Account of its being made in Fraud of the Laws concerning Bankrupts, by reason of its Tendency to prevent that equitable Distribution of the Bankrupt's Estate, which those Laws require? This Cause was first of all heard at the *Rolls*, and his Honour was of Opinion, that there did not appear to be actual Fraud, but that the Deed ought to be set aside by reason of its tending to prevent that equitable Distribution of the Bankrupt's Effects, which the Laws relating to Bankrupts require; and for that Reason his Honour set aside the Deed. From this Decree there was an Appeal before Lord *King* in the *Michaelmas* Term following. That *Chancellor* was of Opinion, That there was no Ground for a Court of Equity to interpose, in Relation to the setting aside that Deed; that it ought to take its Fate here as it would at Law; namely, if a Court of Law would adjudge the Deed to be void, that it ought to be adjudged to be void in Equity; but if a Court of Law would adjudge it to be good, that it ought to be adjudged good in a Court of Equity likewise. But that *Chancellor* said farther, That considering *Lee* had by this Bill of Sale disposed of so great a Part of his Effects, and that with an Intention of defrauding several of his Creditors, possibly the Execution of that Deed might of it self amount to an Act of Bankruptcy. For which Reason an Issue was there directed to try whether, by the Execution of that Deed, the Party did not become a Bankrupt. From this Case his Lordship said this Inference might be drawn, that if the Court had any Notion at that Time, that

the Directions that were there given would have been out of the Case. For which Reason his Lordship said he did believe, that till the Case of *Stephens* and *Soale*, which has been cited, it was never imagined, that such a Case as the present one could be within the Relief of this Act of Parliament. And his Lordship said, it was not fit that so considerable a Question as this, arising upon such an Act of Parliament,

liament, should be determined in this Court, but it ought to be tried at Law; for which Reason an Issue must be directed to try this Point; and the proper Method of trying it will be in a feigned Action, and not in an Action of Trover. The next Question proper to be considered arises upon the Deed of *May* 1734; and the Question is, Whether the Objections, made by the Counsel for the Plaintiff, to this Deed are of such a Nature as to make it proper to inquire into the Consideration of that Deed? And his Lordship's Opinion was, That the Objections to it were so strong, as to make it proper that an Inquiry should be made concerning the *Quantum* of the Consideration upon which that Deed was made. Consider the Nature of the present Case. Here are Debts insisted to be growing for a great Length of Time from *Peele* to *Dodson*. No one Account is pretended to have been stated. This Deed of *May* 1734 recites that 10,500 *l.* was then in Hand paid, which is contrary to the Fact as is agreed on all Hands; and therefore there is a Necessity to enter into the Case to see what the true Consideration really was. On the 27th of *September* 1732 the Securities for the Sums that were then due were cancelled, and one Bond and Letter of Attorney to confess a Judgment were given in the Room of them for 5050 *l.* On the 2d of *October* following *Peele* made an Assignment to *Dodson* of certain Parts of his Effects, by way of Security for 8750 *l.* On the 10th of *January* following there was an Indorsement made on the Back of that Deed, that it should stand as a Security for 9350 *l.* and at the same Time it was agreed, that it should farther stand as a Security for 1000 *l.* more, if that Sum should afterwards be advanced. On the 21st of *April* 1733 a *Memorandum* was made, that that Sum was advanced accordingly. On the 1st of *June* following another Assignment was made by way of Security for 1776 *l.* The Suddenness of these Securities one upon another, the Growth of the Sums, the very Acts themselves speak, that there is a Necessity here, that the Consideration of them should be inquired into. And where Securities have been accumulated so frequently

Where a Court of Equity will direct, that the *Quantum* of the Consideration of a Deed shall be inquir'd into by reason that the Securities which are said to have made up that Consideration were accumulated one upon another.

one upon another, that has been a Reason for directing such an Inquiry. And what is the Proof that is made here of actual Payment of the Consideration-Money? *Grew* and *Harrison* were the subscribing Witnesses to this Deed, and likewise to the former Securities. *Harrison* was dead at the Time that the present Suit was commenced. *Grew* was examined in relation to the Consideration of these several Deeds. Upon his Examination he swore, that he remember'd particularly, that at the Time the Deed of *October* 1732 was made, at the Time the Deed of *April* 1733 was made, and at the Time the last mentioned Deed of *May* 1734 was made, *Peele* acknowledged the Receipt of all the the several Sums for which those Deeds were made a Security. But that is impossible to be true; for at the Time the Deed of *May* 1734 was made, according to *Dodson's* own Account of the Matter, Half a Year's Interest was added to the Principal, which Half Year's Interest was not due till the *December* following. And that Circumstance of Interest being accumulated before it became due, has been an Ingredient for inquiring into the Consideration of a Security; though it is true in the present Case, that the whole Sum of 10,500 *l.* was not to carry Interest till the *December* following. In the Case of *Sir Thomas Meyrs*, before Lord *Harcourt*, a Circumstance of this Sort was laid hold of; and as this Observation may be made on the Deed of *May* 1734, consider how this operates on the former Securities. It is an Argument, that great Part of the Consideration of those Securities was made up of accumulated Interest. And when the present Case is attended with the other Circumstance likewise of there never being any Account made up, the Court must direct an Inquiry to be made, to see what was really due on those Securities. However, his Lordship said he would not require Proof to be made of actual Payment of every Sum, though that has sometimes been required in these Sort of Cases, but would allow

When the Consideration of one Security appears to be made up of Interest which was accumulated before it became due, that shall be an Argument that the Consideration-Mo-

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ney of former Securities was made up in the same Manner.

Where the Court will not require Proof to be made of actual Payment, when they direct an Inquiry concerning the *Quantum* of the Consideration of a Deed, but will allow the Party to give such Evidence of Payment as can be given, considering the Nature of the Case.

allow the Party to give such Evidence of Payment as could be given, considering the Nature of the Case. The remaining Question to be consider'd relates to the two Bank-Notes. It appears, that *Peele* left his House the 14th of *February*, and never returned again. On the 15th of that Instant *Peele* went to the House of *Latham*, and told him he was forced to hide, and desired him to carry two Bank-Notes of 400*l.* each to *Dodson*, towards Payment of Part of his Debts. On the 17th of that Instant *Latham* carried the Notes to *Dodson*, but it did not appear that *Dodson*, at the Time he received them, had any Notice that *Peele* was become a Bankrupt. It has been said, That this Payment to *Dodson* was a void Payment. And it is indeed true, that if the Act of Bankruptcy was committed on the 14th of *February*, the Payment cannot be good, though *Dodson* had no Notice of the Bankruptcy at the Time the Payment was made. But that is often very hard upon Creditors ; and the Courts of Law in such Case will hold the Party to the strict Rule. For which Reason Assignees under a Commission of Bankruptcy cannot bring such an Action for the Money, by which they can consider it as Money received to their Use, but must bring an Action of Trover for it ; and the Reason is, that they cannot insist upon having the Money by way of Contract, but as a Tort. This is like the Case where an Action is brought for Money won at Play, which must be an Action of Trover. His Lordship said in the present Case he would direct an Issue to try at what Time *Peele* became a Bankrupt, by reason that there must be another Issue directed in this Cause, as has been before mentioned ; though otherwise he would not have done it. And so his Lordship was pleased to decree accordingly.

Where a Person makes a Payment of a Debt to a Creditor soon after he becomes a Bankrupt, and the Creditor had no Notice of the Bankruptcy at the Time he received the Money, the Assignees under the Commission shall not be allowed to recover the Money back again in an *Indebitatus assumpsit*, but only in an Action of Trover.

Where an *Indebitatus*

assumpsit will not lie, but the Party shall be driven to his Action of Trover.

Where Interest Money, which made up a Part of the Consideration of the Deed, was accumulated before it became due, that has been an Ingredient for directing an Inquiry into the Consideration of the Deed.

Decemb. 6.

*The Attorney General and Peirce.**L. C. 2. Ark. 17. Sadrell's Rep. R. v. 2.*

MRS. Squire made her Will, and thereby gave certain Legacies to several Persons, and particularly to her Servants. By this Will she gave to *Robert Brown* 10 *l.* per Annum, to be paid him during his Life. And then came a Clause to the following Effect. "She thereby gave certain Legacies to the Charity-Schools of the *Grey-Coat Boys*, of the *Blue-Coat Boys*, and of the *Green-Coat Boys*, in *Westminster*. She gave another Charity to the Hospital of Incurables there. She gave 1000 *l.* to poor House-keepers, to be distributed to such of them, and in such a Manner as *Mrs. Northcote* and *Mrs. Green* should appoint. She gave 200 *l.* to the Parish of *South Morlton*. She gave 200 *l.* to the Parish of *Sunnyhill*, to be distributed amongst those that were at that Time lame or visited with Sicknes; and she likewise gave a Legacy to *Bethlem-Hospital*." Of this Will she made *Mrs. Northcote* her Executrix. After the Death of *Mrs. Squire*, *Mrs. Northcote* made her Will, wherein was a Clause to this Effect. "I give to all the publick Charities, to which Dear *Mrs. Squire* has given any Legacies by her Will, 100 *l.* a-piece." Of this Will she made *Sir John Cross* and *Pierce* her Executors, and appointed other Persons her Residuary Legatees. *Sir John Cross* died in her Life-time, by which Means *Pierce* became the only acting Executor. *Pierce* began to pay 100 *l.* a-piece, by Way of Augmentation to some of the Charitable Uses mentioned in *Mrs. Squire's* Will. But the Residuary Legatees conceiving some Doubts how far the Words *Publick Charities*, mentioned in *Mrs. Northcote's* Will extended, they directed *Peirce* to pay no more Money on that Account till the Opinion of this Court should be taken. The present Information was brought against *Peirce* and the Residuary Legatees in *Mrs. Northcote's* Will, in order to compel him to pay 100 *l.* a-piece by Way of Augmentation

to all the Charitable Uses mentioned in the Will of Mrs. Squire.

At the Hearing of this Cause the Counsel for the Residuary Legatees insisted, that *Peirce* ought not to pay 100*l.* either for the Benefit of poor House-keepers, or for the Benefit of such poor Persons of the Parish of *Sunnyhill* as were Lame, or visited with Sickness.

Lord Chancellor said, his Opinion was, that 100*l.* a-piece ought to be paid to all the charitable Uses mentioned in the Will of Mrs. Squire. He said here are two Wills, one the Will of Mrs. Squire, the other the Will of Mrs. Northcote. In the Will of Mrs. Northcote, there is a Clause to this Effect; "I give to all the publick Charities, to which Dear Mrs. Squire has given any Legacies by her Will, 100*l.* a-piece." It has been said, that by the Words *Publick Charities*, Mrs. Northcote intended to distinguish some of the charitable Uses mentioned in the Will of Mrs. Squire from others of them. But it is a difficult Thing to support a Distinction of this Kind. The Intent of inserting the word *Publick* seems to have been to declare, that Mrs. Northcote did not mean to augment the private Legacies which Mrs. Squire had given by Way of Charity to particular Persons. To this Purpose it is observable, that Mrs. Squire gave by her Will Legacies to her Servants. She gave likewise 10*l.* per Annum to *Robert Brown*, during his Life. And then followed the Clause in Mrs. Squire's Will, by which she gave the Legacies to the several Charities that are there enumerated. It has been objected, that some of the Charities there mentioned are of perpetual Continuance; and from thence it is insinuated as if the word *Publick* could properly be apply'd to those Charities only, but it is observable that there are other Charities which are of as general a Nature as those, and therefore may equally be called Publick. The Charities fixed upon by the Counsel for the Residuary Legatees, as not in their Nature Publick, are those to the poor House-keepers,

What shall
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Words *Publick Charities*.

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keepers, and likewise to the Poor of *Sunnyhill*. With Regard to the first of these Charities, it has been said, that the 1000 *l.* was only distributable to such poor Housekeepers as Mrs. *Green* and Mrs. *Northcote* should appoint. And it has been urged, that one of the Persons, who had the Power of distributing that Charity, is dead. But that Circumstance can make no Difference. And as to the Charity of *Sunnyhill*, it may be as properly called a publick Charity as that to the Parish of *South Moleton*; and so his Lordship was pleased to decree accordingly.

Decemb. 8.

*Blackwell and Harper.**J. C. 2. Atk. 93. Jodrell v. M. R. 2.*

IN 1737, *Elizabeth* the Wife of — *Blackwell* found out an Invention of making Prints of certain medicinal Plants. In those Prints there were seen at one View the Seed, Flower and Fruit of the Plant. And at the Bottom of each Print there was a short Description of the Nature and Effect of them, referred to by Letters. These Prints were in *Chiaro Oscuro*. At the Foot of these Prints there were these Words, *Delineavit, sculpsit & pinxit Elizabeth Blackwell*; but in these Prints the Time was not mention'd when she published her Invention. Soon after she had published these Prints, *Bickham*, who was an Engraver of Prints, published a Set that were in a Manner direct Copies of these. They were made as Copies, by directly inverting the Place where each Part of the Plant that was described stood. And the Copy no otherwise differ'd from the Original, than that in the Copy the Words describing the Nature of the Plant were inserted in the Body of the Print adjoining to the Body of the Plant that was described, whereas in the Original the Words of Description were at the Bottom of the Paper, and the Part of the Plant described was referred to by Letters. *Harper*, and others, who were Printfellers, did each of them sell three or four of these that were sent to them by *Bickham*.

The present Bill was brought by *Elizabeth*, the Wife of — *Blackwell*, and by her Husband against *Harper*, and the other Printfellers, and likewise against *Bickham*, praying to have an Account of the Profits that they made of these Prints, and to have an Injunction in order to restrain them from publishing any more of them. *Bickham* was in Contempt of the Process of the Court, so that he was not brought to Hearing; however the Process was not pursued so far against him, as that the Bill could be taken *pro confesso*.

Lord Chancellor said, That there were two Objections that have been made in the present Case; one, that the Prints in Question are not of such a Kind, as to intitle *Elizabeth Blackwell* to the Benefit of the Statute of 8 *Geo. 2.* on Account of the Nature of the Invention itself; the other, supposing the Invention to be sufficient to intitle her to the Benefit of the Act, that she has not complied with the Circumstances which the Act directs, in order to claim any Benefit under it. With regard to the first of these Matters, his Lordship's Opinion was, that it was no Objection in the present Case. The Ground upon which it is founded is, that the Act intended only to secure the Property of Prints, which were made from a meer Invention of the Mind, and which were not taken from any Thing else. But that is not the Meaning of the Act. The Title of it is “ An Act for the Encouragement of
“ the Arts of Designing, Engraving, and Etching historical
“ and other Prints, by vesting the Properties thereof in the
“ Inventors and Engravers, during the Time therein mentioned.” The Act recites, “ Whereas divers Persons have by
“ their own Genius, Industry, Pains and Expence invented
“ and engraved, or worked in *Metzotinto* or *Chiaro obscuro*,
“ Sets of historical and other Prints, in hopes to have reap'd
“ the sole Benefit of their Labours; and whereas Printfellers
“ and other Persons have of late, without the Consent of the
“ Inventors, Designers and Proprietors of such Prints, frequently taken the Liberty of Copying, Engraving and Publishing, or causing to be copied, engraved and published,
“ base

“ base Copies of such Works, Designs and Prints, to the
 “ very great Prejudice and Detriment of the Inventors,
 “ Designers and Proprietors thereof.” And then the Act
 provides, “ That from and after the 24th Day of June
 “ 1735. every Person, who shall invent and design, en-
 “ grave, etch and work in *Metzotinto* or *Chiaro obscuro*, or
 “ from his own Works and Invention shall cause to be
 “ designed and engraved, etched or worked in *Metzotinto*
 “ or *Chiaro obscuro*, any historical or other Print or Prints,
 “ shall have the sole Right and Liberty of Printing and
 “ Reprinting the same for the Term of fourteen Years, to
 “ commence from the Day of the first publishing thereof.”

So that the Act requires, that the Party should invent and design, engrave, etch or work in *Metzotinto* or *Chiaro obscuro* to intitle the Party to have the Property in the Prints. But notwithstanding this, it is not necessary that it should be an allegorical or historical Design, in order to make it be an Invention within this Act. And a new Print, tho’ taken from Nature, will be within the Act, provided it be not copy’d from any other Print or Prints. The Words of the Act are very general, namely, *any historical or other Print or Prints*; for which Reason, if the Print be made of a Building, Garden, or of the City of *London*, &c. it will be within the Provision of the Act. It is indeed true, that there is a Clause in the Statute making a Provision for an Undertaking of Mr. *Pine* to make a Print of the Tapestry in the House of Lords, and without that Provision he would not have had the Benefit of the Act. But the Reason of that is, that that Print cannot be called an Invention, it being only a mere Copy from the Tapestry. All Tapestry is made from Drawings; the Drawing is the Invention, the Tapestry is a Copy from the Drawings, and consequently Mr. *Pine*’s Prints are only Copies from Copies. The present Prints are quite of another Nature, and clearly Inventions within the Meaning of the Act. If this be so, there can be no Sort of Doubt but that *Bickham* and the Printfellers were guilty of a Breach of the Act, *Bickham*’s Prints being manifestly Copies of the other. The next

What shall
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Question

Question proper to be considered is, Whether *Elizabeth Blackwell* has so far comply'd with the Circumstances of the Act, as to be intitled to any Relief which she seeks by her Bill? And his Lordship was of Opinion, that she had. At the Foot of the Draughts of these Prints there are these Words, *Delineavit, sculpsit & pinxit Elizabeth Blackwell*. But it is indeed true, that she has not put down the Day when she published her Invention. The Words of the Act relating to this Part of the Case are, "That from and after the 24th Day of *June*, which shall be in the Year of our Lord 1735, every Person, who shall invent and design, engrave, etch or work in *Metzotinto* or *Chiaro obscuro*, or from his own Works and Invention shall cause to be designed and engraved, etch'd or work'd in *Metzotinto* or *Chiaro obscuro*, any historical or other Print or Prints, shall have the sole Right and Liberty of Printing and Reprinting the same for the Term of fourteen Years, to commence from the Day of the first publishing thereof, which shall be truly engraved, with the Name of the Proprietor on each Plate, and printed on every such Print or Prints." It has been said, that these Words, *which shall be truly engraved with the Name of the Proprietor on each Plate, and printed on every such Print or Prints*, are Part of the Description of the Day from which the Party is to be intitled to the Benefit of these Prints; and that as the Day is not inserted in the present Prints, there is no *terminus a quo* from which such Interest is to commence. But his Lordship's Opinion was, that this Clause in the Act was directory only, and not descriptive, and therefore that the Day is only necessary to be inserted in Prints where the Penalty of the Act is intended to be taken Advantage of. This is like the Case upon the Statute of 8 Ann. 19. where there is a Provision, that the Title of the Copies of Books shall be enter'd in the Register-Book of the Company of Stationers before the Publication of such Book. But that is only a Provision that is necessary to be complied with when the Penalty of that Act is taken Advantage of. But as the Circumstance of inserting the

Where a Clause in a Statute shall be directory only, and not descriptive.

How far the entering the Copy of a Book in the Book of the Company of the Stationers shall not be necessary.

Day when the Prints were published was not complied with in the present Case, the Consequence is, that the Court can only make a Decree for a perpetual Injunction to restrain the Defendant from publishing these Prints for the Future, and cannot direct an Account to be taken of the Profits of those Prints that have already been published. As this is so, no Costs can be given for the Plaintiff. And there is the less Reason for directing an Account of Profits in the present Case, because the Profits have been so extremely small. In the Case of *Ballard and Waller*, determined by this Court the 6th of *December* last, 'tis indeed true, that the Court did decree an Account to be taken of the Profits that were made by the Printing of a certain Book. But in that Bill it was expressly stated, that the Title to the Copies was enter'd in the Book of the Company of Stationers. And as to Costs his Lordship observed, that there were two other Reasons why they should not be given in the present Case. First, Because

And secondly, Because it is in it self a Matter of Doubt whether the Clause before-mentioned ought to be construed directory or descriptive? His Lordship said, his Opinion indeed was, That this Clause in the Act was only directory, and merely necessary to be observed where the Penalty of the Act was intended to be taken Advantage of. But other Judges might be of a contrary Opinion. And so his Lordship was pleased to decree accordingly.

Decemb. 11.

Walker and Walker.

L. C. 2. Mich. 40.

ON the 12th of *January* 1735 *John Walker* made a Surrender of a Copyhold Tenement of 12 l. per Ann. to his Brother *Ralph Walker* and his Heirs. The Condition of it was, " That *Ralph Walker* should pay to his Brother *Thomas* an Annuity of 5 l. per Annum, and " to his Sister *Anne*, the Wife of ----- an Annuity

“nuity of 40 s. *per Annum*,” and in the Surrender a Power of Entry was given to *Thomas* and *Anne*, in case the Rent should be in Arrear. This Surrender was drawn by *Hermitage*, who was a Clerk to the Steward of the Court, and was lodged in the Hands of *Craven*, a Copyhold Tenant, to whom the Surrender was made. It was sworn by one *John Walker*, who was Cofin to him that made the Surrender, That on the 16th or 17th of *February* following he went to the House of *John*, who made the Surrender, and seeing him very ill in bed, asked him, Whether he had settled his Affairs? The Surrenderor told him, that he had, having surrender’d his Estate to his Brother *Ralph*, who was to pay one Annuity to his Brother *Thomas*, and another Annuity to his Sister, and that *Thomas* at the same Time agreed, that he would surrender a Copyhold Estate of his of the Value of 4 l. *per Ann.* to take Effect after the Death of himself and his Wife, for the Benefit of his Nephew *Ralph*, the Son of his Brother *Ralph Walker*. The Witness swore he replied, That *Thomas* perhaps might refuse to surrender his Estate notwithstanding; and that thereupon the Surrenderor sent for *Hermitage* to draw a Surrender for *Thomas*, and at the same Time sent for *Thomas* to pass it. He swore, That they both came, and that *Thomas* being requested by his Brother *John* to pass the Surrender of his Estate, he refused to do it, saying to this Effect. *I have you fast, and you have not me fast.* Upon this *Hermitage* was order’d by *John* to go to *Craven*, and get up his Surrender which was passed to him. The Witness swore thereupon, That *Thomas* submitted, that he would pass the Surrender of his Estate, and that *Hermitage* was order’d to prepare the Draught of it. The Witness swore however, That he believed the Draught was never prepared, but for what Reason it was not he could not tell. In Confirmation of this Witness it was sworn by another, That after the Death of the Surrenderor *Thomas* came to the House of *Ralph* to demand his Annuity; that thereupon *Ralph* insisted, that *Thomas* should surrender his Estate; but as this Witness swore, *Thomas* answer’d, *I did agree*

to it, but I will not do it. On the other Hand *Hermitage* swore, That at or before the Time that he drew the Surrender of *John* he never heard that there was any Condition intended to be annexed to that Surrender, requiring *Thomas* to surrender his Estate. The Interrogatory, to which this Deposition of *Hermitage* related, only asked him in a general Manner, Whether he knew of any Condition, that was intended to be annexed to the Surrender, requiring *Thomas* to surrender his Estate, and did not at all ask him concerning the Time when he heard that there was such a Condition. *Hermitage* swore farther, That after the Passing of the Surrender from *John*, *Ralph* and his Wife several Times came to him to go to *John*, to talk to him about it; that he accordingly several Times went to him; that at some of those Times *John* told him he had a Design to alter the Surrender, but that he never came to a Resolution to do it; and that at other Times he told him he would not. *John* died in the *March* following, and *Ralph* was thereupon admitted. After the Death of *John*, *Thomas* made an Entry upon the Premises surrender'd to *Ralph*, by reason that *John* refused to pay him his Annuity, and brought an Ejectment against him in order to get into Possession.

At the Trial of this Ejectment a Doubt arose, Whether the Right of Entry could by the Condition be reserved to the Parties to whom the Annuities were made payable? A Case was thereupon made for the Opinion of the Judge at his Chamber upon this Point. The Judge was of Opinion, that the Power of Entry was void upon this Account, and thereupon *Thomas* pay'd the Costs of a Nonsuit.

The present Bill was brought by *Thomas* against *Ralph*, in order to have this Defect in the Surrender of *John* supply'd.

At the Hearing of this Cause a Doubt arose, Whether the Defendant could be intitled to read any parol Evidence

to shew that *Thomas* did agree to make a Surrender of his Estate.

But *Lord Chancellor* said, his Opinion was, that he might. He said this Bill is brought by the Plaintiff, in order to have a Defect in a Surrender supply'd. He comes for Equity, and it is on equitable Circumstances, only that he can have Relief in Equity. The Fact is not rightly stated at the Bar; when it is said, that the Defendant offers parol Evidence to support an Agreement contrary to that which was reduced into Writing. Had the Person, who is now Defendant, been Plaintiff in the Cause, this might have been alledged by Way of Objection, and that Objection would have had more Colour in it. But now he does not come for Equity, and only endeavours to rebut an Equity attempted by the Plaintiff. It is on the Head of Fraud, that the Defendant insists he has a Right to make use of this Evidence. He insists, that the Plaintiff imposed upon *John* that is dead; and if he was guilty of a Fraud and Imposition, undoubtedly he must be intitled to read this Evidence by Way of Defence in order to prove it. A Case has been cited by the Counsel for the Defendant out of *Abridgment of Cases in Equity* 20. which directly comes up to the present one. That was a Case determined by *Lord Nottingham*, soon after the making the Statute of Frauds, on which the present Question arises. And should the Statute be extended to such a Degree, as to exclude the Defendant from giving this Evidence in the present Case, the Statute would tend to encourage Fraud rather than prevent it. When the Evidence is read it will be proper to consider, whether the Declarations, that *Thomas* is supposed to have made about the Surrendering of his Estate, were recent and near to the Time that the Surrender was made by *John*. If they were recent, those Declarations will be of considerable Weight in the present Case. If the Declarations were at a remote Distance of Time, it may be another Matter. But the Evidence must be read, and the Evidence was read accordingly. Upon the Reading it,

Where Parol Evidence shall be allowed to supply the Defect of a Surrender in a Copyhold Estate, notwithstanding the Statute of Frauds and Perjuries.

In a Case of Fraud and Imposition, the Defendant shall be allowed to read Parol Evidence in order to prove it.

Parol Evidence shall be allowed to be read to rebut an Equity set up by the Plaintiff, notwithstanding the Statute of Frauds and Perjuries.

the Nature of the Evidence came out to be to the Effect that has been before stated. And then his Lordship declared his Opinion to be, that considering the Nature of the Evidence, the Plaintiff's Bill must be dismissed; he said the Case which the Plaintiff has made by his Bill is, that *John Walker* intended to make a Settlement of his Estate, which consisted of Copyhold Lands, just before his Death; that he surrendered it unto *Ralph*, and charged it with two Annuities, one for the Benefit of the Plaintiff, the other for the Benefit of his Sister. This Surrender was made on the 31st of *January* 1735; but the Bill charges that there was a Defect in the Surrender in Respect of the Remedy given to recover these Annuities; and therefore the present Bill is brought in order to have that Defect supply'd. The Defence set up by the Defendant is, that the Plaintiff demands his Annuity contrary to Equity and Conscience, by Reason that he ought to have surrender'd his Copyhold Estate for the Benefit of one of the Defendant's Sons, which the Plaintiff refuses to do. The Plaintiff has entered into Proof, in order to shew that he never agreed to surrender his Estate; and the Question is, whether that Proof is to be credited. The Defendant has fully proved, that this was Part of the Agreement, that the Plaintiff should surrender this Estate, and the Evidence given on the Part of the Defendant is in Reality not contradicted by the Evidence given for the Plaintiff, tho' there is an Attempt to make it seem as if there was a Contradiction. It is proved by one of the Witnesses examined on the Part of the Defendant, that on the 16th or 17th of *February* following, he went to the House of *John*, who made the Surrender, and seeing him very ill in Bed asked him, whether he had settled his Affairs. The Surrenderor told him, that he had, by Surrendering his Estate to his Brother *Ralph*, who was to pay one Annuity to his Brother *Thomas*, and another Annuity to his Sister; and that *Thomas* at the same Time agreed, that he would surrender a Copyhold Estate of his of the Value of 4 *l.* a-year, to take Effect after the Death of himself
and

and his Wife, for the Benefit of his Nephew *Ralph*, the Son of his Brother *Ralph Walker*. The Witness swore he replied, that *Thomas* perhaps might refuse to surrender his Estate notwithstanding, and that thereupon the Surrenderor sent for *Hermitage* to draw a Surrender for *Thomas*, and at the same Time sent for *Thomas* to pass it. He swore that they both came, and that *Thomas* being requested by his Brother *John*, to pass the Surrender of his Estate, he refused to do it, saying to this Effect; *I have you fast, and you have not me fast*. Upon this *Hermitage* was ordered by *John* to go to *Craven* and get up his Surrender, which was pass'd to him. The Witness swore thereupon, that *Thomas* submitted that he would pass the Surrender of his Estate, and that *Hermitage* was ordered to prepare the Draught of it. The Witness swore however, that he believed the Draught never was prepar'd, but for what Reason it was not he could not tell. In Confirmation of this Witness it was sworn by another, that after the Death of the Surrenderor, *Thomas* came to the House of *Ralph* to demand his Annuity; and that thereupon *Ralph* insisted, that *Thomas* should surrender his Estate. But, as this Witness swore, *Thomas* answered, *I did agree to it, but I will not do it*. Thus the Matter stands upon the Evidence given for the Defendant. On the other Side *Hermitage* is the only material Witness that has been examined for the Plaintiff. And the Account that he gives, when duly examined, rather favours and supports the Evidence given for the Defendant; he swore, that at or before the Time that he drew the Surrender of *John* he never heard that there was any Condition intended to be annexed to that Surrender, requiring *Thomas* to surrender his Estate. His Lordship said, that he had looked into the Interrogatories to which this Deposition related; and in the Interrogatories there are no such Words, whether *at or before* the making the Surrender by *John* there was any such Condition declared. So that this Deposition of the Witness, whereby he declares, that *at or before* the making the Surrender there was no such Condition, is a meer Evasion.

Evasion. It is a Negative pregnant, and admits, that at some one Time such a Condition was express'd. The Witness then gives an Account, that after the Passing of the Surrender from *John, Ralph* and his Wife came several Times to him to go to *John* to talk to him about it; that he accordingly several Times went to him; that at some of those Times *John* told him he had a Design to alter the Surrender, but that he never came to a Resolution to do it; and that at other Times he told him he would not. This Deposition by no Means contradicts the Witnesses examined for the Defendant; but, as his Lordship before observed, does rather favour and support them. For these Reasons the Plaintiff cannot be intitled to have the Defects in the Surrender supply'd, as he prays by his Bill. And his Lordship said he should not have been clear, if the Defendant himself had been Plaintiff in the Suit; but that he might have had a Decree in Favour of him even in that Case, by having the Benefit of this parol Evidence, upon the Rule, that where there is a Part-performance of an Agreement it shall be no Objection, that the Agreement was not in Writing. And so his Lordship was pleased to decree accordingly.

January 12.

Steed and Whitaker.

IN 1733 *Fletcher* agreed by Articles to sell three Acres of Land to *Steed*, and in the Year after these Lands were contained in his Marriage-Settlement. *Roff*, who was an Attorney, drew the Settlement. In 1736 *Fletcher* mortgaged these Lands, among others, to *Whitaker*. *Whitaker* had no Notice of the Articles enter'd into with *Steed*; but *Roff* was employ'd as his Agent in making this Mortgage. The Mortgagee laid by, and let *Steed* go on to build upon the Premises without giving him Notice of the Mortgage.

Rebecca

Rebecca the Wife of *Samuel Steed* brought her Bill against her Husband, against *Whitaker* and others, in order to have a specifick Performance of the Covenants in her Marriage-Settlement, and to have an Injunction to restrain *Whitaker* from proceeding in an Ejectment which he had brought for the three Acres of Land.

On the coming in of the Answer it was moved, That the Injunction might be continued till the Hearing.

Lord Chancellor was of Opinion, That the Injunction ought to be continued. He said he believed that the Rule of Affecting a Person with Notice of the Title of another by reason of his Agent's having Notice of it, had not been carried so far as to affect him with such Notice, unless where the Agent has it at the Time of his Transaction with him; and that, as the Notice which the *Attorney* had of the Settlement in the present Case was two Years before the Mortgage, the Mortgagee could not be affected by it. This is one Ingredient for continuing the Injunction; and another Ingredient is, that the Mortgagee has lain by, and let *Samuel Steed* go on and build upon the Premises without giving him Notice of the Mortgage. And so his Lordship was pleased to order accordingly.

Where a Person shall not be affected with Notice of another's Title which his Attorney had.

Where a Person letting another go on and build upon an Estate without giving him Notice of

an Incumbrance which he has upon it, shall be a Reason that a Court of Equity will not assist him in setting up the Incumbrance.

Anonymus Case.

January 12.

A Decree of Foreclosure was made, and thereby fix Months Time was given for redeeming according to the usual Form of those Decrees. The fix Months were near expiring, and then the Mortgagor obtained an Order for enlarging the Time for fix Months more. After this he obtained another Order for enlarging the Time fix Months farther. But it was made Part of that Order,

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that

that he should sign the Register's Book, and thereby agree not to ask for a farther Inlargement. He signed the Register's Book for that Purpose accordingly. But notwithstanding that he now moved, that the Time might be enlarged six Months more, and chiefly upon this Circumstance, that the Estate was of greater Value than the Incumbrance upon it amounted to.

Where a Decree of Foreclosure is made, and a certain Time given for the Mortgagor to redeem, if he moves for a farther Inlargement of the Time, where the Court will make it Part of their Order, that the Time which they give him shall be peremptory.

Lord Chancellor said his Opinion was, That upon that Circumstance the Motion was reasonable; but made it Part of his Order, that this last Time should be peremptory.

January 12.

Anonymus Case.

A Bidding before a Master was peremptory, and under that Bidding ----- was reported the best Purchaser. But notwithstanding this, a Motion was now made, that the Bidding might be opened on Account that the Estate was devised for Payment of Debts and Legacies, and that 200*l.* was offer'd more than the Purchase-Money, which was bid before.

Where a Bidding shall be opened before a Master. Judge *Parker*, who sat for *Lord Chancellor*, was of Opinion, That for these Reasons the Bidding ought to be opened; and so he was pleased to order accordingly.

January 12.

Anonymus Case.

A Bill had been filed, to which a Husband was made Defendant without his Wife. The Husband put in his Answer, to which there was a Replication. The Defendant examined two Witnesses. It was now moved, that the Plaintiff might have Liberty to withdraw his Replication, and amend his Bill, by adding the Wife a Defendant

dant ; and to induce the Court to grant this, the Counsel for the Plaintiff offered, that the Depositions which had been so taken should be read at the Hearing.

But Judge *Parker*, who sat for *Lord Chancellor*, was of Opinion, that the Motion could not be granted. He said, if this Motion should be granted, the Depositions which had been taken could not be read against the Wife, notwithstanding the Consent which has been mentioned. And as the granting this Motion would be to suppress those Depositions, the Motion was refused.

Where Depositions cannot be read if the Replication be taken off the File, and the Bill amended by adding Parties.

Defendant has examined Witnesses, the Court will not give Leave, that the Plaintiff shall amend his Bill by adding Parties.

Where the

Anonymus Case.

January 12.

THE Defendant was a *Frenchwoman*, and did not understand *English*. A Motion was now made, that she might have Liberty to put in her Answer in *French*, and that a publick Notary might translate it into *English*. The Register said, That Motions of this Sort are frequent where the Defendant is a Foreigner, and lives beyond Sea ; but that he had never known a Motion of this Sort granted, where the Defendant resides in *England*.

Where a Defendant shall have Liberty to put in his Answer in a foreign Language.

Judge *Parker*, who sat for *Lord Chancellor*, was of Opinion, That this Case was within the same Reason with the other ; accordingly the Motion was granted.

Anonymus Case.

January 12.

THE Plaintiff had made two Persons Defendants to his Bill ; he was apprehensive that one of them was an unnecessary Defendant ; and therefore he now moved, That that Person might be struck off from being a Defendant, on Payment of 40 s. Costs.

Judge

Where the
Party is in-
titled to
Costs to be
taxed.

Judge *Parker*, who sat for *Lord Chancellor*, at first inclined to think, that the Motion ought to be granted, by reason that if the Plaintiff had went to Hearing without replying to this Defendant's Answer, he could have been only intitled to such Costs. But the Register said, That by the Course of the Court the Defendant in this Case was intitled to Costs to be taxed; and thereupon the Motion was refused.

January 12.

J. C. 2. 2. 10. 10. 10.

Lloyd and Williams.

IN 1699 *William Lewis Anwyl* made his Will to the following Effect. " He thereby gave his Wife an Annuity of 300 l. for her Life, in case she would quit her Jointure, to be issuing out of all his Estate (except some Tenements in *Montgomeryshire*) payable Half-yearly, with Power of Distress, and gave his Wife the excepted Premises for her Life, and gave most of the Lands charged with the Annuity to Trustees therein named for twenty-one Years, in Trust, out of the Rents, Issues and Profits thereof, to pay all his Funeral Expences, Debts and Legacies, and after such Payments the Term to cease; provided that if his Heir paid into his Trustees Hands all his Debts, Funerals and Legacies in one Payment, or secured the same, as the Trustees approved, then the Trustees were to resign up the Lands to the Heir; and gave the Inheritance of the Premises, subject as aforesaid, to his Cousin Dame *Catherine Williams* (Wife of *Sir Griffith Williams*, and Mother of the Defendant *Sir Robert Williams*) for Life, without Impeachment of Waste, Remainder to her first and other Sons in Tail, and after other Remainders, the Remainder to his own right Heirs, and gave his Wife all his Goods, Chattels, Plate, Jewels, Household-Stuff and Implements of Husbandry which he had at *Cemmes* in *Pembrokeshire*; and in case his Heir refused to advance Money for Payment of his Funerals, Debts and Legacies, and

" take

“ take the Lands as aforesaid, the Trustees might lease the
“ Premises for the Advancement of the Money, till the
“ Debts and Legacies be paid, and appointed his Trustees
“ Executors, and directed his Debts and Legacies to be
“ paid within five Years after his Death. By a Codicil
“ dated 29 Jan. 1700, he increased the Annuity to his
“ Wife for her Life, to 350*l.* and made another Devise in
“ Favour of his Wife, and gave to his Kinsman *Edward*
“ *Anwyll*, and his Heirs, an Annuity of 100*l. per Ann.*
“ to be issuing and payable yearly out of his *Merioneth-*
“ *shire* Estate, and gave the Reversion of his *Montgomery-*
“ *shire* Estate, subject as aforesaid, in Trust for the Use
“ of his Cousin *John Owen* for Life, and his first and
“ other Sons successively in Tail, Remainder to his Cousin
“ *Arthur Owen* for Life, and to his first and other Sons
“ successively in Tail, Remainder to his Cousin the De-
“ fendant, *Lewis Owen*, for Life, and to his first and
“ other Sons successively in Tail, with Remainder over,
“ and directed that his Trustees and their Heirs should,
“ during his Wife's Life, and till his Cousin *Edward*
“ and *John Owen* had attained their Ages of Twenty-
“ one Years, receive the Rents and Profits of the *Me-*
“ *tionethshire* and *Montgomeryshire* Estates, (except cer-
“ tain Lands he had by Deed devised in Trust for
“ his Wife for Life, and those devised to her for Life
“ by the Will,) with Power of Distress, and thereout
“ first pay 350*l. per Annum*, clear of all Deductions, to
“ his Wife for Life, and all Arrears thereof; and the
“ Annuity of 100*l. per Ann.* to *Edward Anwyll*, till his
“ Age of Twenty-one, and all Arrears thereof, and
“ with the Overplus of the Rents, Issues and Profits,
“ should pay with all the Speed that might be, all his
“ Debts, Legacies and Funerals, and also all the Debts
“ of his late Mother Dame *Catharine Owen*; and after
“ Payment thereof that the Surplus should be paid to such
“ Persons, as shall be intitled to the Inheritance of the Pre-
“ mises by Virtue of the Will and Codicil.” In the *February*

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following

following the Testator died, and a short Time after his Death his Widow intermarried with Mr. *Brereton*.

In 1701 a Bill was brought by his Widow, his Creditors and Legatees, against his Heir at Law, Trustees and Devisees, in order to have the Will established, and the Trust of it carried into Execution.

In 1704 this Cause came on to be heard, and then a Decree was made, whereby amongst other Things it was directed, that the Master should see what the Testator's Debts and Funerals amounted to, and what was the Value of the Testator's Estate, subject thereto, to the End it might appear, whether there was a Necessity to direct a Sale of any Part of the Estate; and the Consideration of any Matters not then determined, was reserved till after the Account should be taken. In 1708 the Master made his Report. In 1713 a Bill of Review was filed in order to reverse this Decree.

In 1714 the Cause came on to be heard on the Bill of Review, and then amongst other Things it was decreed, that the Master should look into the Report, and see what Part of the Estate was proper to be sold, and that a Sale should be made thereof accordingly.

In 1716 a Report was made under this second Decree, and the Master thereby stated the Value of the Trust-Estate in Possession, to be then but 713 *l.* 8 *s.* 4 *d.* *per Ann.* whereout there was payable to *Edward Annyll*, and his Heirs, 100 *l.* *per Ann.* and to Mrs. *Brereton* for Life 350 *l.* *per Ann.* and that the Taxes and other Outgoings *communibus annis* amounted to 120 *l.* *per Ann.* and that the Lands in Reversion were computed to be about 211 *l.* 9 *s.* So that during the Life of Mrs. *Brereton*, if the whole Estate in Possession and Reversion was sold, chargeable with the Annuities, as aforesaid, it would not be sufficient to discharge

charge the Debts, Legacies and Costs, especially considering that the whole *Merionethshire* Estate in Possession and 60 *l. per Ann.* of the *Montgomeryshire* Estate was liable to the Annuity of Mrs. *Brereton*. This Report was afterwards confirmed.

In 1717 a third Decree was made, whereby it was directed, that the Master should receive Proposals for the Sale of any Part of the Estate, but was not to proceed to Sale without farther Order, and with some Directions which no Way related to the Debts or Legacies, that report was to stand confirmed. In 1736 Mrs. *Brereton* died, and thereupon her Annuity ceased, by which Means now the Estate would be sufficient to pay all the Debts and Legacies, with such Interest as should be due upon them, whereas before it was not.

In *August* last a third Report was made, and thereby the Master certified, that a Doubt had been raised before him, from what Time the Simple Contract Debts and the Legacies should carry Interest; and in order to determine this Matter, he stated the Facts before-mentioned specially to the Court; and he farther certified, that the Solicitor for *Elizabeth* and *Mary Parry*, the Representatives of *Richard Evans* (a Simple Contract Creditor and Legatee) insisted, that they are intitled to Interest for that Debt and Legacy from five Years after the Testator's Death, which was the Time of Payment directed by the Will, or at least from the Confirmation of the Reports, or one of them; and that the Solicitor for the Defendants, Sir *Robert Williams* and *Lewis Owen*, who were Remainder-men under the Will before-mentioned, insisted, that Interest ought to be computed for the Debts and Legacies only from Mrs. *Brereton's* Death, when the Profits became sufficient to answer them; but from what Time Interest should be computed, the Master submitted it to the Court.

Lord

Lord Chancellor said his Opinion was, that the Representatives of *Evans* were intitled to Interest for the Debt and Legacy from the Time that the second Report was confirmed in 1716, and no farther. He said, that this Question concerning Interest was open now for the Court to determine; for in the first Decree, which was made in 1704, *All Matters were reserved which were thereby not already determined.* The Question then would be concerning the Right of the Case from what Time Interest shall be given. He said he was inclined to think, that the Debts and Legacies would receive two different Considerations. And tho' it sounds pretty odd, yet he said he did not know but the Case of the Legacies was the clearer Case of the Two. The Legacy in Question is indeed charged upon the real Estate; but it is likewise a Charge upon the Personal. The Consequence of this is, that it is payable within one Year after the Death of the Testator. As this is a Legacy which the personal Estate is charg'd with as well as the real, if the personal Estate be not sufficient to satisfy it, the reversionary Interest in the Land will be liable to discharge it as well as the real Estate which was in Possession. Though it is indeed true, if the Legacies were given meerly chargeable upon the real Estate, and no Time fixed for the Payment of them, that it might have been a considerable Question, whether the Court would not have directed the Legacies to have been paid only out of the growing Rents and Profits, and whether the reversionary Interest in that Case could have been directed to be sold, in order to have raised them. But as the reversionary Interest will be affected with the Legacies in the present Case, the Question will be from what Time the Legacies shall be taken to be payable, whether from one Year after the Death of the Testator, according to the ordinary Rule of

When a Legacy is chargeable on the personal Estate as well as the Real, a reversionary Estate shall be liable to satisfy such Legacy.

When a Legacy is made chargeable upon the real Estate as well as the Personal, how far it shall carry Interest from one Year after the Death of the Testator.

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When a Legacy is only chargeable on the real Estate, and not on the personal, Lord Chancellor said, that he thought it a considerable Question, whether a reversionary Estate could be ordered to be sold to satisfy that Legacy, and whether the Legacy ought not only to be raised out of the growing Profits of the Estate.

From what Time a Legacy shall be said to be payable.

of this Court, or whether only from five Years after his Death, as the present Will and Codicil are penned. Though the Will directs, that the Legacies shall be payable only from five Years after the Testator's Death, the Question would be, whether the Codicil has made a Variation in this Respect. The Words of it are, that the Trustees should pay, *with all the Speed that may be, all his Debts, Legacies and Funerals.* But these Words will make no Difference. The next Question is concerning the Debts; as to that the Matter seems to be more doubtful. It is indeed true, that, where the Party prays his Satisfaction for a Simple Contract Debt merely out of personal Assets, the Court will of Course direct the Debt to be paid, with Interest to be computed from one Year after the Death of the Testator. But where a real Estate is charg'd with the Payment of Debts as well as the Personal, his Lordship said he did not know, that it was absolutely fixed, that Simple Contract Debts should carry Interest from that Time; and he believed, if the Decrees of the Court were looked into, it would be found, that a great many of them are in this Form, that the Master should take an Account of the Value of the Estate and of the Debts, that he should compute Interest upon such of the Debts as carry Interest, without giving any Direction, that Interest should be computed upon the other Debts. And it might be most mischievous if the Rule of Court was, that all the Debts in such Case should carry Interest. 'Tis indeed true, that in *Will. Rep.* 228. 'tis held to the contrary; and there the Words of the Book are, *His Lordship also declared, that by this Trust-Term the Simple Contract Debts became as Debts due by Mortgage, and consequently should carry Interest as well as the Debts secur'd by Bond.* His Lordship said, that he took it, that that Opinion was directly contrary to the Course of the Court. For where a real and personal Estate is subject to the Payment of Debts, the Direction which this Court gives is, that, in Case the Bond-Creditors shall exhaust the personal Estate, the Simple Contract Creditors shall stand in their Place, and receive the like

When a Codicil shall not be said to vary from a Will.

It is indeed true, that, where the Party prays his Satisfaction for a Simple Contract Debt merely out of personal Assets, the Court will of Course direct the Debt to be paid, with Interest to be computed from one Year after the Death of the Testator. But where a real Estate is charged with the Payment of Debts as well as the Personal, his Lordship said he did not know, that it was absolutely fixed, that Simple Contract Debts should carry Interest from that Time.

Where Simple Contract Debts shall carry Interest from the Time a Report is confirmed,

Satisfaction out of the real Estate. So that his Lordship said, that he doubted whether that Observation in the Report was rightly taken. The next Case, which has been cited in the present one, is that in 2 Will. Rep. 26. There no Case is stated, but seven Points are said to have been resolved. The first and second of those Points his Lordship said were clearly settled, and so he observed was the fifth; the seventh is laid down in these Words, *Lord Chancellor said, That it was the daily Practice, if a Man devised his Lands for the Payment of his Debts, this Devise makes the Land as a Security or Mortgage for all the Testator's Debts, as well those by Simple Contract as otherwise; and the Simple Contract Debts shall carry Interest as the Land, which is the Fund, yields annual Profits.* This Resolution of the Court does not determine, where Lands are barely charged with the Payment of Debts, that that will make the Simple Contract Debts to carry Interest. And his Lordship said, That on a general Devise of Lands for the Payment of Debts he should think that Simple Contract Debts ought not to carry Interest. The Words in that Case are, *That the Simple Contract Debts shall carry Interest as the Land, which is the Fund, yields annual Profits.* That imports, that those Debts shall carry Interest; but then that brings the Point to this Question; whether the Lands in the present Case shall be consider'd as yielding annual Profits; and considering the Burden that was upon them by Reason of the Annuities, he could not say that they could. The Annuities and other Outgoings amounted to 570 l. per Ann. and the Profits of the Estate in Possession were only 718 l. per Ann. The Opinions that have been mentioned both of Lord Harcourt and Lord Macclesfield, as there reported, do both of them seem to have gone too far. However, in the present Case, as the Legatees are intitled to Interest upon their Legacies, it would be odd to say, that the Simple Contract Creditors should not be intitled to Interest likewise. And therefore his Lordship said, that he thought the Simple Contract Creditors ought to have Interest allowed them, and that from the Time
the

the Report was confirmed in 1716; for then it was that the Debts were liquidated and asserted. And so his Lordship was pleased to decree accordingly.

*Burgoyne and Hatton.**December 5,
1738.*

SIR Thomas Wendy, being seised of several Estates in the County of Cambridge, in 1657 made his Will to the following Effect. The Will began with declaring, "That it was the Testator's Intention to dispose of all his worldly Estate." The Testator then recited, "That he stood indebted in divers Sums of Money, to the Amount of 6000 *l.* and thereupon he declared, that all his Lands, except his Manor of *Wendy* and his Lands lying therein, and his Manor of *Haslingfeild*, should stand chargeable in the first Place for the Payment of those Debts." And for that Purpose the Will followed to this Effect. "I give and devise to three Trustees and their Heirs (particularly naming them) all my Lands, except my Manor of *Wendy* and my Lands therein lying, and my Manor of *Haslingfeild*, and my Manor and Farm of *Haukston*, which I give to my dear Wife for four Years, in Trust for the Payment of my Debts as aforesaid; the Remainder to *Thomas Steward* for Life, the Remainder to his Wife for Life, the Remainder to my Trustees to preserve contingent Remainders, the Remainder to his first and other Sons in Tail Male, the Remainder, as to one Moiety of the said Estates, to *Lady Kemp* for her Life, and as to the other Moiety, to *Susan Steward* for her Life, the Remainder to *Sir Roger Burgoyne* and the Heirs Male of his Body, the Remainder to my own right Heirs for ever. And as to my Manor of *Wendy* and my Lands therein lying, together with my Manor of *Haslingfeild*, I devise the same to *Thomas Steward* and the Heirs Male of his Body." *Thomas Steward* was Heir at Law to the Testator, and *Lady Kemp* and *Susan Steward* were Sisters to *Thomas Steward*.

The

The Testator died in 1673, the Debts were paid off in three Years; and afterwards, in 1674, the Trustees mentioned in the Will convey'd the legal Estate to the Parties that were intitled to the equitable Interest, with this Difference only, that Sir *John Moor* was made a Trustee to preserve the contingent Remainders, and the Remainder to Sir *Roger Burgoyne* was limited generally to him in Fee, without limiting any Remainder over.

In 1686 *Francis Hatton* became a Purchaser of the *Haukston* Estate of Mr. *Steward*, and the Conveyance was made in this Manner. Lady *Kemp* and *Susan Steward* joined in this Conveyance with Mr. *Steward* and his Wife. The Conveyance was made to Trustees, it being in order to make a Marriage-Settlement. And at the End of the Deed Sir *John Moor*, who was likewise made a Party to it, declared, That he confirmed the same to the Trustees, to have and to hold to them for the Purposes mentioned in the Settlement. A Fine was likewise levied of the Premises accordingly. Under this Deed *Francis Hatton* entered upon the Premises in that Year, and the Estate was enjoy'd by the Defendant under that Settlement to the present Time.

Mr. *Steward* died, and afterwards his Wife died in 1729. The Plaintiff Sir *Roger Burgoyne*, who was Grandson to Sir *Roger* mentioned in the Will, came of Age in April 1731; he thereupon immediately made an Entry upon the *Haukston* Estate, and afterwards, in the same Year, brought his Bill against the Defendant for an Account of the Rents and Profits of this Estate; the Deed of 1674, whereby the legal Estate was convey'd in the Premises, not being at that Time any way known to him.

In 1736 this Deed was sent to him by one Mr. *Lisle*, who purchased another Estate of him. And thereupon, in Easter Term 1736, the Plaintiff brought an Ejectment

to recover this Estate at Law. Upon that the Defendant moved, that the Plaintiff might make his Election, whether he would proceed at Law, or in this Court; and he made his Election to proceed here.

The *Attorney General* argued as Counsel for the Defendant, and said, That he apprehended, that even supposing the Plaintiff should be thought to have a Right in this Case, that still he had taken an improper Remedy by coming into this Court. He did readily agree to the Case out of 1 *Vern.* 295, which had been cited by the other Side, but submitted it, that it did not come up to the present Case; for that Case was no more than to shew, that an Infant might bring a Bill of Account for Rents and Profits against an Intruder. But he conceived, that the present Case was distinguishable from that by reason that here the Defendant enjoy'd the Estate under a Settlement which at least was a strong Colour of Title. And this would have been an Objection if the Plaintiff had even been an Infant at the Time of bringing his Bill; but he was of full Age at that Time, and he knew no Case that such a Person could bring a Bill of this Sort, by reason that Part of the Profits had been received during his Infancy. He observed likewise, that the Plaintiff's Remedy was still the more improper on Account of the Deed of 1674. By that Deed the Plaintiff has a Title at Law, if he has any Title, and therefore his Remedy at Law should have been taken. But even supposing that there had been some Colour for the Plaintiff's coming into this Court at first, yet nothing could be said for his making his Election to proceed here after the Deed of 1674 was sent to him. The Defendant too, he observed, was clearly a Purchaser, and, he apprehended, a Purchaser without Notice. But he said, that he conceived the Plaintiff had no Right at all, by reason that under the Will of Sir *Thomas Wendy* he did not apprehend that the Lands in Question were devised any longer than merely for the Term of four Years; he said he should not contend but they were charged for Payment

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ment of Debts. And the Case of the Earl of *Warrington* was indeed strong for that Purpose, to shew that even less Words than these would serve to make such a Charge; but still he conceived, that when that Purpose was answered, which was done in about three Years, the Debts being paid off in that Time, there was no reason to say, that the Lands were devised away any farther, the Exception in the devising Clause plainly extending to exempt these Lands out of the Devise, unless for that Term of four Years; and if this was so, Mr. *Steward* was intitled to them as Heir at Law.

Mr. *Brown* argued on the same Side, and for Authority cited 1 *Vern.* 106.

And Mr. *Clark* on the same Side cited *Bridg. Rep.* 103. and said, That the Case mentioned by Mr. *Brown* out of *Vern.* is reported in another Part of that Book, and likewise in 1 *Lev.* 287.

Lord Chancellor said he would in the first Place consider, whether the Plaintiff has any Right in the present Case, and in the next Place, whether he has taken a proper Remedy. With regard to the first Point it seemed to him, that the Plaintiff had a strong Probability of having a Right, and that was as much as was necessary for him to declare, considering the Direction which he should give. The Testator, in the Beginning of his Will, declares his Mind to be to dispose of all his worldly Estate. He then recites the Debts that he owed, and declares, That all his Lands, except the Manor of *Wendy* and his Lands lying therein, and his Manor of *Haslingfeild*, should stand chargeable in the first Place for the Payment of those Debts; so that in declaring his Intention, tis extremely plain, that he designed to dispose of all his Lands, excepting his *Wendy* Estate and his Manor of *Haslingfeild*, for the Payment of his Debts in the first Place. He then goes to execute his Intention, and for that Purpose devises to three Trustees
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and their Heirs, particularly naming them, all his Lands, except his Manor of *Wendy* and his Lands therein lying, and his Manor of *Haslingfeild*, and his Manor and Farm of *Haukston*, which he gave to his Wife for four Years, in Trust for the Payment of his Debts as aforesaid, and then limits the several Remainders over. He said it seem'd to him, that the Intention of this devising Clause was, that all his Lands should be disposed of in the Manner which he has mentioned, except the *Wendy* Estate, and the Manor of *Haslingfeild*, and the Term of four Years given to his Wife in the Manor and Farm of *Haukston*. And this is the more plain, if the Words be a little transposed, by reading them in this Manner; *My Manor and Farm of Haukston for four Years, which I give to my dear Wife.* And such Transposition of Words has been allowed to be made; for which Purpose he cited *Hobart* 75. and *Salk.* 234. In this last Case indeed Lord Chief Justice *Holt* differed from the three Judges that were of that Opinion. But it appear'd by a Note which he had, taken by my Lord *Raymond*, that the Judgment was affirm'd in the Exchequer-Chamber according to the Opinion of the three other Judges, and that the same was afterwards done on a Writ of Error in the House of Lords. His Lordship said he would now consider the Objections that have been made to the Remedy which the Plaintiff has taken, by filing his Bill in the first Place, and afterwards making his Election to proceed in this Court. He did own, that he was not well satisfied, that the Plaintiff's being an Infant whilst Part of these Profits were received, would have been a sufficient Ground for him to have brought this Bill for an Account of the Rents and Profits. He said it was very true, that an Infant may bring such a Bill against a Disseisor, and that is in Conformity to the Rule of Law in the like Case, where an Infant may bring an Action of Account against the Person that disseises him, and charge him as a Receiver. He said it was true likewise, that formerly it has been held in this Court, that, though the Person entering upon the Infant has a Colour of Title, as under a Settlement, a Bill of this

Where a Testator shall be supposed to intend to dispose of all his Lands, except certain Lands particularly mentioned.

Where the Law will allow of Words to be transpos'd in construing a Will.

Where an Infant will be intitled to bring a Bill in Equity for an Account of Profits.

Where a Purchaser shall be said to have Notice of a Will, by reason of Persons joining in the Conveyance, which otherwise would not have been necessary.

Where a Person shall be intitled to make his Election to proceed in Equity, notwithstanding he has had a Discovery of a Deed.

this Kind would lie for an Infant in that Case. But for his Part he owned he had a Doubt, whether of late a Bill of this Sort has been held to lie in that Case. And he was unwilling to determine that Point here; for he thought there was no Occasion for it. But the Matter which he founded his Opinion upon was, That the Plaintiff was proper in coming into this Court at first, by reason that the Deed of 1674 was not then known to him; and therefore he could not tell but that his Title was merely an equitable Interest; and had his Title been such a one, the Defendant could not have barred him, on account of his being a Purchaser from Mr. *Steward*; for that it appears on the Face of the Deed of 1686, that he had the clearest Notice imaginable, that Mr. *Steward* took only under the Will of Sir *Thomas Wendy*. The two Sisters of Mr. *Steward* join in the Conveyance with him, which there would have been no Occasion for, had Mr. *Steward* claimed as Heir at Law. Besides, Sir *John Wood* is Party to the Conveyance, which there would have been no Occasion for, but only upon that Account. But then it has been objected to the Plaintiff, that he was wrong in making his Election to proceed here after the Deed of 1674 was made known to him. But still his Lordship's Opinion was, That the making that Election ought not to prejudice the Plaintiff neither. He said it was very true, that the Plaintiff came of Age in *April* 1731, and tho' he made his Entry immediately after, yet that Entry could not serve him, by reason that he did not bring his Ejectment within a Year after, as the Statute for the Amendment of the Law requires. It has been objected, that he should have proceeded in the Ejectment which was deliver'd in *Easter* Term 1736. But his Lordship said, he did not well know whether the five Years were not then past since the Time of his coming of Age, and consequently whether at Law he would not have been intirely barred; at least this was such a doubtful Matter as made it much more prudent for the Plaintiff to make his Election to proceed here; and therefore his making such Election should not prejudice him.

him. And there was the stronger Reason for this, because the Deed of 1674 was not strictly a Conveyance of the legal Estate according to the Will. For by the Deed a Remainder in Fee is limited to the Plaintiff's Ancestor, whereas by the Will he was only intitled to a Remainder in Tail. And this he said in Reality was not so favourable a Conveyance to the Plaintiff, as it would have been if the Remainder had been limited in Tail; for then he would not have been subject to the Debts of his Ancestor, he coming in *per formam Doni*, whereas in the other Case he would. For these Reasons his Lordship said, that he would retain the Bill for a Year, and would give the Plaintiff Liberty to try his Title at Law in the mean Time, and would not suffer the Defendant to take any Advantage at the Trial, of the Plaintiff's Nonclaim, or his not bringing his Ejectment in due Time. And the Court he said has in other Cases given the like Sort of Directions, where for particular Reasons they have not permitted a Defendant to take Advantage of the Statute of Limitations, when there has been a Suit depending in this Court relating to that Matter; and so his Lordship was pleased to order accordingly. *Vide the next Case.*

Sir Roger Burgoyne and Hatton.

June 21.

SINCE the Cause came last on before the Court, Sir *Roger Burgoyne* brought his Ejectment for the Manor of *Haukston* before-mentioned; which Action came to be tried before Lord Chief Justice *Wills*. At the Assises an Order of *Nisi prius* was entered into by Consent, that the Plaintiff should have a Verdict, but that that Verdict should only stand as a Security to him, and that the Matter of Law in that Cause, arising upon the Words of Sir *Tho. Wendy's* Will, should be referred to the Opinion of the Chief Justice at his Chambers. Afterwards he declared his Opinion to be, that the Manor and Farm of *Haukston* are not totally excepted out of the Devise to the Trustees, but for

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four Years only. And thereupon Sir Roger Burgoyne entered up his Judgment.

In *June* 1738 the Defendant Mr. *Hatton* filed his Cross Bill against the Plaintiff. And in this Cross Cause the Fact appeared to be to the following Effect. “ In 1673 Sir *Tho. Wendy*, by his Will before-mentioned, devised all his Lands, except his Manor of *Wendy* and his Lands lying therein, and his Manor of *Haselingsfield*, to certain Trustees and their Heirs, in Trust for Payment of his Debts and Legacies, which Debts amounted to 6000 *l.* Then came the following Clause; “ *Item*, Whereas my hopes
 “ are, that by the Prudence and Care of him or them,
 “ that shall succeed me in the Enjoyment of my Estate,
 “ together with the Assistance of my said Trustees, the
 “ Estate may be kept intire, and no Part of it abso-
 “ lutely sold; therefore my Desire is, that my said Tru-
 “ stees do not, during the first three Years after my De-
 “ cease, sell or cause to be sold any Part of my Lands
 “ and Premises, but only take, receive and enjoy the
 “ Rents and Profits thereof, and employ the same for and
 “ towards the Payment of my Debts, Funerals and Lega-
 “ cies; and in Case the Person or Persons, who shall be
 “ intitled to the Trust of the Premises, shall at any Time
 “ within the Space of three Years next after my Decease,
 “ pay and discharge all my Debts, Funeral Expences and
 “ Legacies, or so much thereof, which will make up
 “ the Sum and Sums of Money which I owe, and the
 “ Charge of my Funeral, and the Sum and Sums of
 “ Money which I give and bequeath by Way of Le-
 “ gacies; then and in such Case the further Trust here-
 “ of is, that my Trustees, and the Survivor and Sur-
 “ vivors of them, shall not make any Sale of any of the
 “ Lands and Premises. But in Case the Person or Per-
 “ sons, who shall be intitled to the Premises, shall not
 “ discharge my Debts within the Time, then my Will
 “ and Meaning is, that my Trustees, and the Survivor or
 “ Survivors of them, shall make Sale of so much and
 “ such

“ such Part of my Lands as they shall think fit, for the
“ full discharging of my Debts. “ *Item*, I do hereby de-
“ clare, that if my Trustees shall execute any Estate to
“ my Nephew or Nieces, pursuant to their Trust, that
“ they cause such Clauses to be inserted for preserving
“ the contingent Remainders, as is usual in such Cases.”
And by the same Will Sir *Thomas Wendy* gave two
Legacies of 600 *l.* each to the Lady *Kemp* and *Sarah Stew-*
ard, the Sisters of Mr. *Steward*.

Soon after making the Will the Testator died. Upon his
Death Mr. *Steward*, who was his Nephew and Heir at
Law, and likewise Devisee, as appears by the former State
of the Case, entered into Possession upon the Manor of
Haukston, together with the other Lands particularly devi-
sed to them. In 1674 he intermarried with *Lucy Hatton*,
and thereupon, by Deed of the 14th of *September* in that
same Year, in Performance of the Trust reposed in them,
and for executing the Estate according to the Trust thereof,
and for and in Consideration of a Marriage-Portion of
6000 *l.* the Trustees conveyed the *Haukston* Estate, a-
mongst other Lands, to *Steward* for Life in strict Set-
tlement, and for Default of Issue Male of *Thomas Stew-*
ard, Lady *Kemp* and *Sarah Steward*, all and singular the
Manors and Premises, and particularly the Manor of
Haukston, were limited to Sir *Roger Burgoyne*, his Heirs and
Assigns for ever, according to the Uses and Limitations in
the Will and Settlement.

In *July* 1686 Sir *Edward Atkins* writ a Letter to Sir
Roger Burgoyne, the Defendant's Grandfather, wherein he
tells him, that the Manor of *Haukston* ought to have come
to *Steward* and his Heirs, and that it was a Mistake to be
limited by the Will, as 'twas done; for which Reason he
desires him to join with *Steward* in the Sale of it.

About the *November* following, a Case was stated for
the Opinion of Sir *Francis Pemberton*; and after reciting
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the material Clauses in the Will of Sir *Thomas Wendy*, the Fact was stated in that Case in the Manner following.

“ Sir *T. W.* died without Issue; his Nephew *P. S.* the next
 “ Man in Remainder, upon his Marriage, and before any
 “ Land sold, paid all the Debts, Funeral Charges and Legacies; and the Trustees settled the Manor of *Hafelingfeild* and *Haukston* pursuant to the Directions in the
 “ Will, that is to say, to himself for Life, the Remainder
 “ to Trustees for his Life, and to Sons in Tail Male; then
 “ to his first Niece in like Manner, and afterwards to the
 “ second Niece in like Manner; then for Default of such
 “ Issue, to Sir *R. B.* and the Heirs Male of his Body,
 “ with the Remainder over. *T. S.* nor either of the two
 “ Nieces have, or are ever like to have any Issue Male.
 “ *T. S.* presseth Sir *R. B.* to join with him in selling the
 “ *Haukston* Manor, pretending it was settled with *Hafelingfeild* by Mistake, and ought not to be settled, though he
 “ that drew the Will drew the Settlement, and was also
 “ one of the Trustees that made the Settlement, and a
 “ great Lawyer.” This great Lawyer was Sir *Edward Atkins* before-mention’d; and the Opinion that Sir *Francis Pemberton* gave was, that the Manor of *Haukston* passed by the Will of Sir *Thomas Wendy*. “ By Deed bearing Date
 “ the 22d of Nov. 1686, made between Sir *John Moor*
 “ and *Lucy Steward*, Wife of *Tho. Steward*, of the first Part,
 “ Sir *John Brodrick*, Sir *Robert Griffey* and *Edward Nicholas*,
 “ of the second Part, *Anthony Bowyer* and *John Nicholas*, of
 “ the third Part, *Frances Nicholas* Widow, and *Oliver Nicholas*,
 “ of the fourth Part, and *Francis Hatton*, eldest Son
 “ and Heir apparent of *Lucy Lewes*, and *Frances Nicholas*
 “ the Younger, sole Daughter of *Frances Nicholas* the
 “ Elder, of the fifth Part, reciting that a Marriage was
 “ then intended to be had between *Francis Hatton* and
 “ *Frances Nicholas* the Younger, and that 1440 *l.* Part of
 “ the Marriage-Portion of *Frances Nicholas* was paid or secured to Sir *John Nicholas*, Sir *John Brodrick*, Sir *Robert Griffey*, and *Edward Nicholas*; it was thereby agreed,
 “ that the 1440 *l.* should be laid out in a Purchase of
 Lands

“ Lands of Inheritance, to be settled to the Use of *Francis Hatton* for Life, Remainder to Trustees to preserve
“ contingent Remainders, with Remainder over, for the
“ Benefit of younger Children of the Marriage, with
“ Remainder to the right Heirs of *Thomas Hatton*; and
“ by the same Indenture the Sum of 6000 *l.* of the separate Estate of *Lucy Lewes*, was agreed to be laid out
“ in Land for the Benefit of *Francis Hatton* and *Frances Nicholas*, and their Issue, in Manner therein mentioned.”

And about the same Time a Bill was brought by Sir *John Brodrick*, Sir *Robert Griffey*, *Edward Nicholas*, Sir *Robert Wright*, Sir *John Nicholas*, and others, Creditors of *Steward*, against *Steward* and his Wife, and against Sir *Edward Atkins* and Sir *John Moor*, setting forth, that *Steward* was indebted to the Plaintiffs, Sir *Robert Wright*, Dr. *Brady* and Mr. *Coleborne*, and that he did, for discharging his Debts, by Articles under Hand and Seal, agree with these Plaintiffs to sell to them for 1200 *l.* an Estate in Fee in the Manor of *Haukston*, and that they provided their Money, but were since informed, that *Steward* could not sell such Estate; for that Sir *Tho. Wendy*, who was seised of the Premises, did by his Will in Writing devise the same with other Lands to Dame *Lettice Wendy*, the Defendant Sir *Edward Atkins* and one *Richard Winch* and their Heirs, upon Trust for Payment of his Debts and Legacies; and afterwards to limit the same to the Defendant *Steward* for Life only, with contingent Remainders, but with Power for *Steward* to settle the same in Jointure upon any Wife; and that *Steward*, upon the Marriage with *Lucy* his Wife, did limit the same with other Lands to her in Jointure; that the Trustees in the Will of Sir *Tho. Wendy*, did accordingly convey the Premises to Sir *John Moor*, to the Use of *Steward* for Life, and then to *Lucy* for her Jointure; whereby *Steward* was disabled to perform the Agreement, to the Prejudice as well of Sir *John Nicholas*, Sir *John Broderick*, Sir *Robert Griffey* and *Edward Nicholas*, as of the other Plaintiffs, the Creditors, who were in danger of losing
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their Debts, except the Agreement went on; and therefore the End of the Bill was to have an Execution of the Agreement. *Steward* by his Answer confessed the Agreement, and set forth, That *Sir Thomas Wendy*, by his Will in Writing, directed all his Manors and Lands in the County of *Cambridge*, except the Manor and Farm of *Haukston* and some other Lands, to such Trustees as in the Bill was set forth, for Payment of his Debts; and that the Defendant, not thinking the Manor and Farm was excepted, as it really was, did, upon his Marriage, according to the Power mentioned in the Will, limit the same unto *Lucy* his Wife in Jointure, as supposing the same was convey'd to the Trustees by the Will; but that he was since advised, inasmuch as that Manor was excepted in the Will, and he was Heir at Law to *Sir Thomas Wendy*, he had sufficient Power to perform the Agreement, and that he and his Wife had levied a Fine of the Premises to *Sir John Nicholas*, in Pursuance of the Agreement. *Sir Edward Atkyns*, by his Answer, confessed the Manor was excepted out of the Devise to him and the other Trustees; but that they on *Steward's* Marriage did convey the same, as before set forth. And *Sir John Moor*, by his Answer, set forth, that his Name was used as a Trustee for *Lucy* on her Marriage; but that her Friends, particularly her Mother, approving of the Sale, he was willing to join therein, being indemnified by the Court. Whereupon, in *February* 1686, it was ordered, that the Manor of *Haukston* should be sold to the Plaintiffs; and that the Defendants the Trustees, particularly *Sir John Moor*, should join in the Sale, and be indemnify'd; and thereupon, by Deed dated the 27th of *November* 1688, made between the before-named *Thomas Steward* and *Lucy* his Wife, of the first Part, *Sir John Nicholas*, *Sir John Broderick*, *Sir Robert Griffey* and *Edward Nicholas*, of the second Part, *Sir Robert Wright* and *Elizabeth* his Wife, and *Sarah Steward*, of the third Part, *Sir John Moor*, of the fourth Part, and *Francis Hatton*, of the fifth Part, reciting in Part the first mentioned Indenture quinquepartite, and that with the Appro-

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bation of *Francis Hatton*, the Trustees had agreed with *Thomas Steward* to pay him 1200 *l.* Part of the 1440 *l.* for the Purchase of the Manor of *Haukston* and other Lands. It was witnessed, that *Thomas Steward* and *Lucy* his Wife, for and in Consideration of the 1200 *l.* to him paid by Sir *John Nicholas*, Sir *John Broderick*, Sir *Robert Griffey* and *Edward Nicholas*, with the Approbation of *Thomas Hatton*, did grant unto Sir *John Broderick*, Sir *Robert Griffey* and *Edward Nicholas* the Manor of *Haukston*, and all and singular the Lands and Tenements therein particularly mentioned and described, to hold to Sir *John Nicholas* and other Trustees, their Heirs and Assigns, to the several Uses only, and subject to the Provisoes, Declarations and Agreements in the first mentioned Indenture quinquepartite, declared concerning the Lands which should be purchased with the 1440 *l.* as in the last-mentioned Indenture, bearing Date the 27th Day of *November* 1686, and containing a Covenant from *Thomas Steward* for quiet Injoyment from any Person claiming under him, *Lucy* his Wife, or Sir *Thomas Wendy*, and also a Covenant for levying a Fine by *Thomas Steward*, Sir *Robert Wright* and *Elizabeth* his Wife, and *Sarah Steward*, unto Sir *John Nicholas* and the other Trustees, of the Manor and Premises, appears; which Fine was levied accordingly. And by the same Indenture Sir *John Moor* did grant, and confirm the Manor unto Sir *John Nicholas* and other Trustees, to the Uses above-mentioned. Under this Conveyance *Thomas Hatton* claimed; and thereupon the Cross Bill was brought by *Thomas Hatton* against Sir *Roger Burgoyne*, and against *Lisle*, who claim'd as a Purchaser with Notice under him, insisting, that the Lands devised by Sir *Thomas Wendy's* Will in Trust for the Payment of his Debts, were not above the Value of 500 *l. per Ann.* and that in Fact *Steward* paid a great Part of those Debts and Legacies with his own Money; whereupon it pray'd, That the Plaintiff in the Cross Cause might stand in the Place of *Steward*, and retain a Satisfaction out of the *Haukston* Estate for the Monies that *Steward* had so expended. And at the same Time
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that this Cross Cause was set down to be heard, the original Cause came on before the Court likewise on the Equity reserved.

Mr. *Archer* argued on the Part of the Defendant in the Cross Cause, and for Authority cited 3 *Rep.* 20.

Lord Chancellor said, That since the Time of filing the original Bill a Cross Bill has been filed, which occasions the principal Difficulty in the present Case. The Point insisted on by the Cross Bill is, That the Manor of *Haukston* is Part of the Trust Estate, subjected by the Will of Sir *Thomas Wendy* to the Payment of his Debts. It has been said, That, during the first three Years after the Death of Sir *Thomas Wendy*, the Trustees could only discharge the Debts by the annual Rents and Profits of the Estate; that those Rents were by no Means sufficient for that Purpose; that Mr. *Steward* paid them off with his Wife's Portion, within a Year after the Testator's Death; that that appears by the State of the Fact in the Case that has been mentioned. It has been said, that he thereby became a Creditor upon the Estate, to reimburse himself the Money that he so expended, and that the Plaintiff in the Cross Cause has the same Equity that *Steward* himself would have had. But his Lordship's Opinion was, that the Plaintiff in the Cross Cause was not intitled to the Equity that he sought by his Bill. 'Tis indeed true, that did it appear that *Steward* would have had an Equity to have come upon this Estate, the Plaintiff in the Cross Cause would have had the same. But his Lordship's Opinion was, that *Steward* himself had no such Equity. To determine whether he had or not, it is necessary to resort to the Will of Sir *Thomas Wendy*, to consider the Trust arising under that Will, and the Acts that have been done subsequent to it. The Will is in this Manner; it gives the Lands in Question to Trustees for the Payment of his Debts. Then follows the material Clause on which the present Question depends. " *Item, Where-*
" as my Hopes are, that by the Prudence and Care of
I " him

“ him or them that shall succeed me in the Injoyment of
“ my Estate, together with the Assistance of my said
“ Trustees, the Estate may be kept intire, and no Part of
“ it absolutely sold; therefore my Desire is, that my said
“ Trustees do not, during the first three Years after my
“ Decease, sell or cause to be sold any Part of my Lands
“ and Premisses, but only take, receive and injoy the Rents
“ and Profits thereof, and imploy the same for and to-
“ wards the Payment of my Debts, Funerals and Lega-
“ cies; and in case the Person or Persons who shall be in-
“ titled to the Trust of the Premisses shall at any Time,
“ within the Space of three Years next after my De-
“ cease, pay and Discharge all my Debts, Funeral Expen-
“ ces and Legacies, or so much thereof which, with the
“ Rents and Profits that my Trustees shall in the mean
“ Time receive, will make up the Sum and Sums of Mo-
“ ney which I owe, and the Charge of my Funeral, and
“ the Sum and Sums of Money which I give and bequeath
“ by way of Legacies; then and in such Case the farther
“ Trust hereof is, that my Trustees and the Survivor and
“ Survivors of them, shall not make any Sale of any of
“ the Lands and Premisses; but in case the Person or
“ Persons who shall be intitled to the Premisses, shall
“ not discharge my Debts within the Time, then my
“ Will and Meaning is, that my Trustees, and the Sur-
“ vivor or Survivors of them, shall make Sale of so
“ much and such Part of my Lands as they shall
“ think fit for the full Discharging of my Debts.” What
is the Construction of this Clause in the Will? Plainly
it is, that the Trustees should not sell the Estate for the
Payment of the Debts during the Space of three Years;
and that during that Time the Persons who were to suc-
ceed in the Estate were to have the Election whether they
would not discharge the Debts themselves in order to pre-
vent the Estate from being sold; but not a Word is said,
that by paying them off they were to have a greater Inte-
rest than otherways they would have been intitled to. By
paying them off they were indeed to secure their own In-

terest in the Estate, and that is all that they could do. Consider then what it is that *Steward* has done. He meets with a Fortune of 6000 *l.* within the three Years; and thereupon, in 1674, which was the Year after the Testator's Death, the Trustees executed a Conveyance of the Lands in Question, amongst other Estates, to Mr. *Steward*. This Conveyance is said to be in Performance of the Trust reposed in the Trustees, and for executing the Estate according to the Trust thereof, and for and in Consideration of the Marriage-Portion of 6000 *l.* Upon these Considerations the Trustees convey the legal Estate to *Steward* for Life in strict Settlement, and in Default of such Issue Male of *Thomas Steward*, Lady *Kemp* and *Sarah Steward*, all and singular the Manors, Lands and Premises, and particularly the Manor of *Haukston*, were limited to Sir *Roger Burgoyne*, his Heirs and Assignees for ever, according to the Uses and Limitations in the Will and Settlement. *Steward* having this Conveyance made to him did not sell the Premises till 1686, and then the Purchaser had Notice of the Will of Sir *Thomas Wendy*. At the Time this Purchase was going on a Doubt arose, whether Mr. *Steward* could make a good Title to this Estate. A Case was accordingly drawn up for the Opinion of Counsel. No Imagination was at that Time had, that *Steward* had the Equity which is now thought of; and the only Question for the Opinion of the Counsel was, Whether the *Haukston* Estate was settled or not? The Decree too that was made soon after plainly shews, that the Parties had no Imagination of what is now contended for, and that the only Thing that was aimed at by that Bill, was the Rectifying the Mistake in the Settlement on Account of the Intention of the Will, that this Estate was not designed to have been included. And as *Steward* himself would not have had this Right, the Plaintiff in the Cross Cause by no Means can. And so his Lordship was pleased to decree accordingly.

The Earl of Thanet and others against Paterfon and others. July 11, 1738.

S. C. Cornell's ms. K. v. 2.

THE present Bill was brought by the Earl of *Thanet* and his Son against the Defendants, who were Owners of certain Tenant-Right Estates in the County of *Westmoreland*, insisting upon general Fines, not exceeding two Years, according to the improved Value of the Land, due from them upon the Death of the Lord of those Manors.

The Bill fet forth, That upon the Death of *Thomas* late Earl of *Thanet*, in 1729, the Eftate devolved to the pre-fet Earl under a Settlement, and that upon the late Earl's Death the Fines in Queftion were due to him.

The present Bill therefore was brought by the present Earl of *Thanet* as Tenant for Life under that Settlement, and likewise by his Son the next Remainder-man in Tail, praying, That those Fines might be paid to the present Earl, and that this Custom might be established.

To this Bill the Tenants set forth by their Answer, That true it was, that general Fines were due to the Lords of these Manors upon the Death of a former Lord, and likewise that growing Fines were due to them upon the Change of a Tenant. But then they insisted upon it, that by the Custom of these Manors no greater Fine was due upon the Death of a Lord than ten times the Value of the ancient Rent, which is called a *Tenpenny Fine*; and that no greater Fine was due for the growing Fine than seventeen times the Value of the old Rent, which is called a *Seventeenpenny Fine*.

The Tenants likewise preferred a Crofs Bill againſt the Plaintiffs, whereby they pray'd, That the Fines, as they ſet them forth, might be eſtabliſhed, and that certain other Cuſtoms relating

relating to those Estates might be established likewise. This Bill farther set forth, That the Daughters of the late Earl had made an Entry upon these Manors immediately after the Death of the late Earl, claiming a Title to them. These Ladies were made Defendants to this Bill, together with the present Earl, and the Bill pray'd, That they might interplead one with another. And an Affidavit was annexed to this Bill, setting forth, That it was indifferent to the Tenants which-ever of them they paid their Fines to.

To this Bill the Daughters of the late Earl of *Thanet* put in their Answer, and thereby set forth, That these Manors were originally granted from King *John* to one *Robert De veteri ponte*, and the Heirs of his Body, and that they were those Heirs. And as to the Settlement which the present Earl of *Thanet* claimed under, they said, that it was only supported by a Fine and Recovery, which they were advised was void, inasmuch as the Reversion of those Manors was in the Crown.

Mr. *Fazakerley* argued as Counsel for the Plaintiffs in the original Cause, and to shew that the present Earl was intitled to these Manors, and not the Daughters of the late one, he said, That King *James* the 1st, by Letters Patent, granted his Reversion to this Family, and that being out of the Crown, the Fine and Recovery would be well maintainable. This Point he said was so held in the Case of Lord *Anglesea* and the Earl of *Derby* in the Court of Exchequer. And to shew that the Statute of 34 H. 8. which this Question depends upon, was to be construed strictly, he relied upon *Raymond* 288. and *Gardner's* Case there cited. Thus much he observed, to shew that the present Earl was unquestionably intitled to these Manors; but he thought it was pretty extraordinary, that a Question of this Nature should be handled in the present Cause, where the original Bill was only brought to establish a Right to Fines due from the Tenants. He did own, that by the Proofs it

it did not clearly appear whether the present Earl was in the Right in the Dispute, or whether his Tenants were; and therefore he readily agreed, that a Trial must be directed. The Question would be, Where the Issues should be tried? and considering the Length and Difficulty of them, he believed it was certain, that the Issues must be tried at the Bar, and the Doubt would only be by what Jury they should be tried, Whether by a Jury from *Middlesex*, or by a Jury from *Westmoreland*? He said, that he apprehended a Jury from *Westmoreland* would be very improper, inasmuch as most of the Estates in that Part of the Kingdom are Tenant-Right Estates. And in the Case of the Duke of *Somerset*, where there was a Question relating to certain Fines due from Estates of this very same Tenure, the Jury came from *Middlesex*, and there was a Trial at Bar likewise; and the same was done in the Case of Lord *Anglesea* and the Earl of *Derby* before-mentioned, where the Issue was tried in the Common Pleas.

The *Attorney General* argued as Counsel for the Daughters of the late Earl *Thomas*, and said, That if the Court should be of Opinion, that this Bill was properly an interpleading Bill, so that the Dispute between the present Earl and the Daughters of the late Earl might be finally settled, he should be very ready to offer what he had to say in Support of the Ladies Title. But he conceived this was not properly an interpleading Bill, for that the Fines claimed by the present Earl were not brought into Court.

Lord Chancellor said he was desirous that this Question concerning the Propriety of the Cross Bill with regard to Ladies Title might be first determined.

Whereupon Mr. *Brown*, as Counsel for the Tenants, said, That he apprehended they were well justified in this Part of the Cross Bill, inasmuch as the Ladies actually signed a Letter of Attorney, empowering an Entry to be made on their Behalf.

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Mr.

Mr. *Wilbrabam* on the same Side said, that tho' a Lord for the Time being, who is even a Disseisor, may claim Fines from Tenants due on their Admission to a Copyhold, yet he apprehended that none but the rightful Owners of Manors could bring a Bill a-piece to establish a Custom in it. And as to what was objected by Mr. *Fazakerly*, That the Money claimed for these Fines should be brought into Court, he said that was by no Means necessary, unless the other Side moves, that they may bring the Money in. And the Tenants have set forth by their Answer, that they are willing to pay what shall be found to be due.

Lord Chancellor said his Opinion was, that so much of the Cross Bill, as sought to bring in question the Dispute between the Earl and the Ladies, ought to be dismissed.

What shall
be said to be
an inter-
pleading Bill.

Where a Bill
of Inter-
pleader will
not lie.

How far in
an inter-
pleading Bill
the Parties
shall be obli-
ged to bring
the Money
into Court.

There were two Questions, he observed, for him to consider; 1st, Whether this Cross Bill was a Bill of Interpleader with regard to the Form of it? and, 2dly, Whether in the present Case a Bill of Interpleader will lie, or not? With regard to the first Point, his Opinion was, that this was not an interpleading Bill with regard to the Form of it; he said he did readily agree, that 'tis not necessary that the Plaintiff in such Bill should bring the Money into Court, unless the other Side requires it. But it is necessary in such Bill, that the Plaintiff should make an Offer to bring it in, and even the whole of the Money, as it is demanded by the original Bill, which in the present Case the Tenants have omitted to do. With regard to the second Question, his Opinion likewise was, that no interpleading Bill would lie in the present Case at all. 'Tis agreed on all Hands, that the present Earl is in Possession, and has been so from the Death of the late Earl in 1729. And though in that Year the Ladies did make an Entry, yet they never thought proper to pursue their Claim to this very Day. There could therefore be no Doubt but that the present Earl was intitled to these

Fines

Fines as against the Tenants, and that they could not be bound to pay them over again; there was another Reason likewise, why the Ladies could in no Manner be intitled to the Fines claimed by the original Bill, in as much as they were set by the Steward of the present Earl at a Court holden in his Name; and if the Ladies would have made any Title to Fines, they must have held Courts in their own Names, and have set their Fines themselves, and demanded them likewise; and as to what was objected, that a Person must be rightful Owner of a Manor, in order to bring a Bill to establish a Custom, he said there was no Rule of Court that requir'd that, tho' it is very true, that he, that has a bare Interest for Life in an Estate, cannot bring such Bill alone, but he that has the Inheritance must be joined in it. He did own that the Objection concerning the Entry had at first some Weight with it, but he thought it was capable of two plain Answers, one with regard to Lords of Manors in general, the other with regard to the Jurisdiction of this Court. As to Lords of Manors, it would be extremely difficult upon them, if because a Title is set up by another, the Right which they have to Fines from their Tenants must be delayed, and they must go through the Course of an interpleading Bill. And if this should be so in the present Case, there might be equal Reason of going through the Course of twenty interpleading Bills, if Titles were set up by twenty different People; and if this should be allowed of with regard to the general Fines, it might even be insisted on with regard to the growing ones. As to the Jurisdiction of the Court, he said it might be a great Inconvenience to that, for instead of Courts of Law determining the legal Title between different Claimants, as it properly belongs to them to do, it would involve this Court in determining a great Variety of these Sort of Questions. For these Reasons his Lordship said his Opinion was, that this Part of the Cross Bill must be dismissed. The Question would be, whether with Costs, or not; but his Opinion was, that there could be no Costs, even with regard to
any

What Persons only can bring a Bill to establish a Custom.

Where a Defendant shall not have Costs given him by Reason that he might have demurred to the Bill.

any of the Ladies. Two of them made Default at the Hearing, and therefore with regard to them, 'tis clear they can be intitled to no Costs, and as to the other Ladies, he said they might have demurred to the Bill; and he has known the Master of the Rolls often give that as a Reason, why a Defendant should not have Costs given him; and besides in the present Case there was the less Reason for their having them, inasmuch as by their Answer they have insisted upon a Title. Accordingly this Part of the Cross Bill was dismiss'd generally without Costs. The Counsel for the Tenants then went into their Objections to the other Matters, which Mr. *Fitzakerly* had prayed; they said they should not contend but Issues must be directed, and two Questions would arise; 1st, Whether those Issues should be tried at the Bar? and, 2dly, Whether they should be tried by a Jury from *Middlesex*? With regard to the first Question, they said, that these were local Matters, and therefore ought to be tried in the County where they arise. With regard to the Second, they said it could not be doubted, but an equal Jury might come from the County of *Westmoreland*, at least they apprehended that a Jury from a neighbouring County might try this; and the like was done in the Case of *Holt* and *Terry*, where a Jury was ordered to come from the County of *Stafford*, because the Court could not award their Process into *Cheshire*. Lord Chancellor said, That he thought there could be no Doubt, but that these Issues ought to be tried at the Bar; and it was indeed agreeable to the Statute of *Nisi prius*, which says, that the Trial shall be at the Bar, *Ubi Magna indiget examinatione*. He said his Opinion likewise was, that these Issues should be tried by a Jury from *Middlesex*. The Customs concerning these Tenant-Right Estates are very general through most of these neighbouring Countries, and are a Sort of Border Law, for which Reason he did not think that the Cause could receive an indifferent Trial by a Jury from any of those Counties. And in the Case of Issues directed by this Court, a greater Latitude is always allowed of than in Issues arising in Courts of Law. He said it would

Where an Issue shall be directed to be tried by a *Middlesex* Jury, notwithstanding the Facts arose in a foreign County. What to Tenant-Right Estates.

would be cheaper for the Parties to have a Jury from *Middlesex*, than to have it from any other County; and there have been several Precedents in this Court, where Issues of this Kind have been directed to be tried by a Jury from this County. 'Twas so done in the Case of the Duke of *Somerset* and *Franks*, which related to a Tenant-Right Estate, though there indeed the Question only was, whether a Tenant for Life was intitled to such general Fines. The like was done in the Case of the Dutcheſs of *Somerset* concerning the Estate of the Earl of *Northumberland*; and so was it likewise in the Case of *Champion* and *Atkinson*. 3 *Keb.* 90. And so his Lordship directed accordingly. A Question then arose where the other Issues should be tried relating to the Customs claimed by the Tenants in the Cross Bill. *Lord Chancellor* inclined to be of Opinion, that those Issues should be tried at the Bar by a *Middlesex* Jury likewise within a few Days after the former Trial should be over, inasmuch as it was hardly possible, that they should all be tried on the same Day; and he said, that the same was done in the *Appleby* Cause, where one Information relating to that Corporation was tried at the Bar on one Day, and a Trial of another of them Two or Three Days after. But at last the Parties consented, that these other Issues should be tried at *York* or *Lancaster*, as the Court should direct, when the Trial of the first Issues should be over. *Vide the next Case.*

The Earl of Thanet and Patterson.

March 6.
1739.

WHEN this Cause came on before, Mr. *Fazakerly* as Counsel for the Earl produced a Paper, wherein he had settled the Form of the Issues, as he had conceived they were proper to be framed; the first Issue was to this Effect, "Whether by the Custom of the several Ma-
"nors, on the Death of the Lord or Lady, the Lord was
"intitled to arbitrary Fines not exceeding two Years
"Value;" the second Issue was to this Effect, "Whe-

Ante 247.

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"ther

“ther on the Death or Alienation of a Tenant the Lord
“was intitled to a Fine not exceeding two Years Value of
“the Land.”

The Counsel on the other Side agreed, that the Issues should be directed in this Manner; and the Court directed them in that Manner accordingly. But there being the Interest of an Infant in Question, the Order directing these Issues was not drawn up by Consent.

These Issues came to be tried at the Bar of the Court of King's Bench; but when these Issues came to be tried there, that Court was of Opinion, that the Words *not exceeding two Years Value* were Part of the Fact of the Issue, and that the Plaintiff was precluded from giving Evidence, that ever any greater Fines were set than two Years Value of the Land; and in some Measure upon that Account the Jury found both the Issues for the Defendants; but these Words *not exceeding two Years Value* were really inserted by the Plaintiff's Counsel, upon an Imagination, that it was only that which the Law would imply.

And thereupon the Matter came on now before this Court upon a Motion for a new Trial, and upon a Petition of Rehearing, wherein it was pray'd, That the Issues might be rectified, by striking out the Clause *not exceeding two Years Value*; and likewise the Cause was set down by the Defendants on the Equity reserved.

Lord Chancellor had inquired of the Judges, Whether they were satisfy'd with the Verdict that was given? and they certified him, that they were.

His Lordship was now of Opinion, that the Issues ought to be varied in the Manner that has been mention'd, and that a new Trial ought to be granted; and so his Lordship was pleas'd to order accordingly. *Vide the next Case.*

The Earl of Thanet and Patterson.

February 7.

THIS Cause now coming on in the Paper again, the *Ante 253.*
 Counfel for the Earl faid, That the Earl and his Tenants had come to an Agreement amongst themfelves, and Part of that Agreement was, That the Earl fhould relinquish the Order that he had obtained for a new Trial, and that he fhould take his Decree againft the Tenants upon the Verdict already given. But in order that this Decree might be made effectual againft fuch of the Tenants as had figned a Writing, whereby they agreed to ftand by thofe Tenants that were made Defendants to this Suit, it was pray'd, That that Agreement, together with the Names of thofe Tenants, might be annexed by way of Schedule to the Mafter's Report. And it was faid, that this was fo done in the Cafe of the Duke of *Somerfet* and *Franks*. But for want of a Consent of the other Side, in relation to another Part of the Agreement, the Cause was ordered to ftand over.

When fome of a Perfon's Tenants enter into an Agreement to ftand by others of the Tenants, who are made Defendants to a Suit which is brought againft them by the Lord, where the Court will

direct, that that Agreement fhall be annexed by way of Schedule to the Mafter's Report.

Scorbrough and Burton.

January 14.

George Burton entered into Articles with *Scorbrough* for the Sale of an Eftate; but previous to thofe Articles he had confefled a Judgment to his Brother *Thomas Burton*. This Judgment was a Lien upon the Eftate; but at the Time of the Articles it did not appear that *Scorbrough* had any Notice of it. A fhort Time after *Scorbrough* filed his Bill againft *George Burton*, in order to have a fpecifick Performance of the Articles.

In 1733 the Cause was heard at the Rolls; and then a Decree was made, that *George Burton* fhould convey his Eftate to *Scorbrough* in Purfuance of his Agreement, and that he fhould procure his Brother *Thomas* to join in the
 Con-

Conveyance. The Decree likewise directed, that, in case *George Burton* should give farther Trouble to *Scorbrough*, then *Scorbrough* should be at Liberty to apply to the Court for Cofts.

Soon after the making this Decree *Waite*, who was an Attorney for *George*, brought him in a considerable Bill for Cofts, and insisted, that *George* should mortgage this Estate to him for his Security. *George* accordingly made him a Mortgage of it; and afterwards *Waite* brought his Bill of Foreclosure against *George*, and likewise against *Scorbrough*. He likewise filed an amended Bill against them on the same Account; but both these Bills were dismissed with Cofts.

In 1736 *George* appealed from the Decree that *Scorbrough* had obtained against him; but on the Appeal the Decree was affirmed. After the Affirmance of the Decree *George* executed to *Scorbrough* a Conveyance of this Estate; but *Thomas* his Brother had not even to this Day joined in the Conveyance. It was uncertain whose Fault it was owing to, that *Thomas* did not join in it. It was sworn on the Part of *George*, that it was owing to the Fault of *Scorbrough*; it was sworn on the Part of *Scorbrough*, that it was owing to the Fault of *Thomas*.

Where a Person is to apply for Cofts by way of Petition.

A Petition was now preferred on the Part of *Scorbrough*, praying, That he might have his Cofts.

When a Decree directs, that if a Defendant gives farther Trouble the Plaintiff shall be at Liberty to apply for his Cofts, where the Plaintiff shall be intitled to apply for them.

Lord Chancellor said his Opinion was, That *Scorbrough* was intitled to Cofts. He said, that this was an Application for Cofts on the Foundation of a Clause inserted in the Decree at the Rolls, that the Plaintiff should be at Liberty to apply for Cofts in case the Defendant *George Burton* should give him any farther Trouble. Clauses of this Kind, his Lordship said, he did not much approve of; because a Judge ought rather to determine the Matter of Cofts on the Merits of the Cause before him, or else should reserve the Consideration of Cofts to be determin'd on some Fact that should happen afterwards to be ascertain'd before the

Master

Master. However, the Ground which the Court has gone upon in inserting Clauses of this Sort into Decrees has been, that Costs in a Court of Equity are in the Discretion of the Court. And where the Court has seen a Ground, on the strict Justice of the Case, to give Costs at the Hearing, in their Discretion they have thought it more useful and beneficial for the Plaintiff to insert a Clause of this Kind concerning them. The Construction of Clauses of this Kind has been, not that the Defendant by appealing from the Decree should be said by that Means to give farther Trouble to the Plaintiff, and thereby to incur the Costs; for that would be for an inferior Court to inflict a Penalty on the Party for appealing, which the superior Court will not admit of; but the Construction of them has been, that the Defendant should not give other Sort of Trouble to the Party in Opposition to the Decree. There are two Grounds on which the Plaintiff insists, that the Defendant *George* has given him such other Sort of Trouble, and therefore that he is intitled to his Costs. One of those Grounds has been, that the Plaintiff had farther Trouble given him by the Mortgage of this Estate which *George* made to his Attorney; the other, that *George* has not, even to this Day, procured his Brother *Thomas* to join in the Conveyance. With regard to the last of these, it is doubtful on the Affidavits of the Parties, whose Fault it was owing to that *Thomas* did not join in the Conveyance. It has been sworn on the one Side, that it was owing to the Fault of *Scorbrough*; it has been sworn on the other Side, that it was owing to the Fault of *Thomas*. This Circumstance therefore cannot be relied on as a proper Matter to intitle the Plaintiff to the Costs in the present Case. But the other Circumstance is a Matter of sufficient Weight for this Purpose; it shews that *George* has by his own Act intangled the Affair subsequent to the Decree, and thereby given farther Trouble to the Plaintiff. The making this Mortgage to *Waite* has given Occasion to two Bills; the one an original Bill, the other an amended one, to both which the Plaintiff was made a Party. The Con-

Where the Court will insert a Clause in a Decree, that in case the Defendant gives the Plaintiff any farther Trouble, the Plaintiff shall be at Liberty to apply for his Costs.

The Construction of such Clause has been, not that the Defendant should be restrained from appealing, but that he should not give the Plaintiff any other Sort of Trouble, in Opposition to the Decree.

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veyance

veyance which was executed to *Waite* was such a one, as in the Nature of it was almost necessary to produce a Suit. It is indeed true, that those Bills have been dismissed with Costs; but every Body knows, that Costs taxed between Party and Party are not a sufficient Satisfaction for the Costs which a Defendant has been out of Pocket. This was in plain Contradiction of the Clause inserted in the Decree. And so his Lordship was pleased to order accordingly.

January 15.

Hinds and Dod.

ROFF became indebted to *Hinds* in 1680 l. which Sum was secured by Judgment. He likewise mortgaged his Estate to *Dod*. The present Bill was brought by *Hinds* against *Dod* and *Roff*, praying to be relieved against this Mortgage in respect of the Judgment; and it was set forth in the Bill, that at the Time of the Mortgage *Dod* had Notice of the Judgment.

Dod put in his Answer, and thereby denied, that at the Time of entering up of the Judgment he had any Notice of it. This Answer was reported insufficient; and then he put in a second Answer, whereby he swore, that at the Time of signing and entering up of the Judgment he had no Notice of it. This Answer was reported to be sufficient. To this Report an Exception was now taken.

Where an Answer shall not be sufficient with regard to the Denial of Notice of a Judgment.

Where a Bill is brought by a Judgment-Creditor, in order to be

relieved a-

gainst a Mortgage, the Answer of the Mortgagee will not be sufficient, unless he denies that he had Notice of the Judgment at the Time of signing it.

Lord Chancellor was of Opinion, that this second Answer was insufficient likewise; he said, the Party has only swore in the Conjunctive, that at the Time of the signing and entering up of the Judgment he had no Notice of it; whereas he should have sworn, that at the Time of the signing or entering up of the Judgment he had not this Notice. His denying, that he had not this Notice at the Time the Judgment was enter'd up, is by no Means material;

terial; it is his having Notice of the Judgment at the Time of signing it, that can only affect him; and that which makes it the more reasonable to require of him an exprefs Denial of the Notice of the Judgment at the Time of signing it, is, that in his former Answer he only swore, that at the Time of entering up of the Judgment he had not this Notice; which Answer was clearly on that Account insufficient. Accordingly the Exception was allowed.

Roberts and Kyffyn.

January 15.

OWEN Roberts made his Will, wherein was a Clause to the following Effect. "I give to my Daughter *Eleanor Kyffyn* 100 l. and all Interest due thereon which *Thomas* her Husband owes me, and also all the Goods and Things of what Kind soever, that be in her own Closet at *Beaumaurice*." At the Time of making his Will *Eleanor* lived in the House of the Testator. She had in her Closet, which was in his House, 41 l. 7 d. which was Money belonging to the Testator at the Time of his Death. On Exceptions to the Master's Report the Question was, Whether this Money passed by the Will?

Where a Sum of Money, which a Person has in a Closet, shall not pass by a Will.

Lord Chancellor was of Opinion, that it did not.

Roberts and Kyffyn.

January 15.

IN 1711 *Owen Roberts* made his Will, wherein was a Clause to the following Effect. "I give to *Thomas Roberts* 300 l. which I have at Interest, secured by a Mortgage on the Estate of *Marriot*; and also I give him all the Messuages, Lands and Tenements secured for the Payment of that Money till the same be paid and discharged." Soon after the making this Will the Testator died; at the Time of his Death there was but two Months Interest due upon the Mortgage.

On

Where Interest due upon Mortgage shall not pass by a Will.

A Man by his Will gives a Bond to another, in which a third Person was become bound to him, the principal Sum only passes, and not the Interest incurred. Where a Testator shall be intended to convey by his Will something that is certain, and not that which is uncertain.

On Exceptions to the Master's Report, *Lord Chancellor* was of Opinion, That only the principal Sum of 300*l.* which was secured by the Mortgage, passed by the Will, and that the Devisee was not intitled to any Interest due upon the Mortgage; he said, if there had been only the first Clause in the Will, it would have been extremely clear, that only the principal Sum contained in the Mortgage passed by the Will, and that the Interest due upon the Mortgage would not have passed by it; the Clause is, "I give to *Thomas Roberts* 300*l.* which I have "at Interest, secured by a Mortgage on the Estate of "*Marriot.*" This Clause could convey nothing but the principal Sum of 300*l.* for which the Mortgage was made a Security. This is like the Case of a Man's giving a Bond to another, in which a third Person was become bound to him. There the principal Sum only passes, and not the Interest incur'd upon it in the Life of the Party. The Reason for these Cases is, that the Testator appears to have intended to have conveyed something that is certain, and not that which is uncertain. The next Matter proper to be consider'd is the subsequent Clause in the Will. The Words of it are, "And also I give him all the Messuages, "Lands and Tenements secured for the Payment of that "Money till the same be paid and discharged." Had this Clause gone no farther than to have conveyed the Messuages, Lands and Tenements secured for the Payment of the Money, it might have been more doubtful, whether under those Words the Interest might not have passed as well as the Principal. For it might have been said, that those Words were only descriptive of the Lands that were mortgaged, and that under those Words the Testator might have intended to have given the whole that was secured, namely, the Interest as well as the Principal; however, that would have been a pretty strained Construction; but the Words in the Clause do not rest there. For they go on and say, *till the same be paid and discharged*, that is till the 300*l.* be paid and discharged. And from thence an

Argument may be drawn, that nothing but the 300*l.* was intended to pass. Besides the ordinary Rule in the Construction of Wills is, that where a former Clause in a Will is express and particular, a subsequent Clause shall not enlarge it. And so his Lordship was pleased to order accordingly.

When one Clause in a Will is express and particular, a subsequent Clause shall not enlarge it.

Worthington and Foxhall.

Jan. 16.

THE Bill set forth, that a few Years ago *Sharp* had a Design of setting up the Trade of a Refiner in the City of *London*, but that *Foxhall*, *Prestland*, and two others, who were the only Persons that were concerned in this Sort of Business, entered into a Combination against him. The Bill charged, that *Worthington* was a Foreman in this Business, and that *Sharp* made Offers to him of taking him into his Service. It was set forth, that in order to prevent this, *Foxhall* procur'd *Worthington* to enter into an Agreement with him to serve him in this Business, and no other Person, for seven Years, which Agreement was reduced into Writing.

The Bill charged that *Worthington* was imposed on in this Agreement. And thereupon it was brought by him against *Foxhall*, in order to be relieved against it. To this Bill *Foxhall* put in his Answer, but omitted to take any Notice of that Part of the Charge of the Bill which related to *Sharp*, nor did he say any Thing relating to the Combination which has been mentioned.

This Answer was referr'd to the Master for Insufficiency. And the Master reporting, that the Answer was insufficient, an Exception was now taken to the Master's Report, that the Answer was sufficient to a common Intent. This occasioned three Exceptions now to be argued before the Court, to shew that the Answer was insufficient. They were all to the same Purpose which has been before men-

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tioned,

tioned, namely, that the Answer had taken no Manner of Notice of that Part of the Bill which related to *Sharp*, nor did it say any Thing as to that Part of it which related to the Combination.

What Matters are proper to be inquired into in a Bill relating to a Fraud.

Lord Chancellor said his Opinion was, That the Answer in these Respects was insufficient. He said, that this was a Bill that is brought in order to be relieved against an Agreement on the Head of Fraud. And in Cases of this Kind all Circumstances are material to be inquir'd into as far as they tend to discover that Fraud. It has been often observed in this Court, that Equity comes out of pure Fountains, but that Fraud comes out of impure and muddy ones. 'Tis indeed true, that the Plaintiff does insist upon it, that he was imposed upon in this Agreement, and on that Head it is that he seeks to be relieved. But the Circumstances, which are inquir'd into by that Part of the Bill which is in Question, may give great Light to discover that Fraud. For if the original Matter relating to *Sharp* was in the Manner stated by the Bill, it shews that the Transaction was wrong in its original Foundation. Every one of the Matters set forth in the Bill, which the Defendant has not answered, tend to evince this Fraud. The first of them relates immediately to *Sharp*; it sets forth the Design that he had to exercise the Trade of a Refiner, and the Steps that were taken in order to prevent his doing it; that for this Purpose the Defendant and the rest of them attempted to hinder him from getting Workmen to assist him in this Employment. 'Tis indeed true, that it is admitted by the Bill, that the Defendant drewed the Plaintiff into the Agreement in Question, before the Time that *Sharp* apply'd to him to take him into his Service. But that Circumstance will not alter the Case, for the Meaning in them was to prevent *Sharp* from any Possibility of exercising this Trade. And for that Purpose they began before-hand with him, and secur'd the Plaintiff before *Sharp* could apply to him. This Part of the Bill, which the first Exception relates to, only sets out a Combination in general.

neral. The next Part of it, which the second Exception relates to, sets forth particular Instances of that Combination. And if the general Charge of Combination is right, the Plaintiff is well warranted in setting out the particular Instances of it. The remaining Parts of the Bill, which the third Exception refers to, sets forth the Design which the Defendant and the rest of them had to prevent *Sharp* from working at their Bar. This Part of the Bill tends to give farther Light into this Matter; and therefore is proper to be answer'd, as well as the other Parts of it. Confederacies and Combinations are very proper Heads of Relief in this Court. And that appears from this, that in every Bill they are suggested. 'Tis indeed true, that at this Day general Suggestions of that Sort are but Matter of Form, which the Defendant is not oblig'd to give a particular Answer to. But if a particular Combination is alledged, a particular Answer must be given to it. And in the present Case there is more than ordinary Reason that this particular Combination should be answer'd. The Agreement in Question tends to the Prejudice of the Publick in general; and on publick Considerations, Agreements of this Sort must not be admitted of. On this Foundation it is that Agreements with young Heirs before they come to their Estates are not allowed of by this Court. And on the same Ground is it that Marriage-brokage Bonds and clandestine Agreements in Marriage Treaties, contrary to the open one, are not tolerated. And so his Lordship was pleased to order accordingly.

Where a Person may be allowed to set forth in a Bill particular Instances of Combination.

Combination and Confederacy are very proper Heads of Relief in a Court of Equity.

When a particular Combination is alledged in a Bill, a particular Answer must be given to it. In Respect of the Publick it is, that Agreements with young Heirs before they come to their Estates, are not allowed of by this Court. And

on the same Ground is it, that Marriage-brokage Bonds and clandestine Agreements in Marriage Treaties, contrary to the open one, are not tolerated.

What Agreements in Restraint of Trade shall not be allowed of in a Court of Equity.

Wilson and Williams.

Jan. 20.

M*Organ* was concerned as Solicitor for *Wilson*. An Order was obtained, that his Bill of Costs should be taxed, and that *Wilson* should pay him the Money that should be found
order to have the Benefit of his Bill of Costs.

Where a Person shall be allowed to stand in the Place of a Solicitor, in Bill of Costs.

found to be due to him on such Taxation. In this Order there was the usual Clause, That he should be examined on Interrogatories. After this Order was made he was under Prosecution for Forgery, and absconded on that Account; but he assigned the Benefit of his Bill of Costs to *Hazard* for a valuable Consideration.

A Petition was now preferred to the Court by *Hazard*, praying, That he might be allowed to stand in the Place of *Morgan*, and that the Money due on this Bill of Costs might be paid him.

How far a Person shall not be allowed to have the Benefit of a Solicitor's Bill of Costs without procuring the Solicitor to be examined on Interrogatories.

Lord Chancellor was of Opinion, that he ought to be allowed to stand in the Place of *Morgan*; but inclined to think, that he could have no Order for the Payment of any Part of this Bill of Costs, till he could get *Morgan* to be examined on Interrogatories.

January 20.

Cockerel and -----.

Cockerel imploy'd *Bell* as his Solicitor, and *Bell* imploy'd *Sedgwick* as his Clerk in Court. *Sedgwick* obtained an Order for taxing the Bill of Costs due to him from *Bell*. On such Taxation a very small Sum was taken off his Bill; thereupon he obtained another Order for Payment of the Costs incurred by such Taxation. He pursued *Bell* so far as a Commission of Rebellion, in order to get the Money that was due from him, but was not likely to recover any Thing from him. This occasioned his preferring a Petition now before the Court, whereby he pray'd, among other Things, That he might detain the Papers of *Cockerel*, which he had in his Hands, not only till the Costs were pay'd him which were reported to be due to him by the first Order, but till those Costs were paid likewise which were incurred by the former Taxation.

Lord Chancellor was of Opinion, that *Sedgwick* was intitled to detain the Papers of *Cockerel* till those Costs were paid him, which were reported to be due to him by the first Order, but that he had no Right to detain them till the remaining Part of the Costs were paid him which were incurred by the Taxation.

When a Clerk in Court obtains an Order for taxing the Costs of the Solicitor who employ'd him, and after-

wards obtains another Order for Payment of the Costs incurred by such Taxation, how far he shall not be allowed to detain the Papers of the Solicitor's Client till the Costs incurred by such Taxation are paid him.

Murfy and Balderston.

January 22.

Richard *Murfy* employ'd *O'Bryan* as his Solicitor; and in 1730 he obtained an Order for taxing his Bill of Costs. *Richard* died soon after, and on his Death *Jane* his Widow became his Representative. She revived the Order before-mention'd. In 1731 she died. Mrs. *Thwaites* proved her Will as her Executrix, and took out Administration *de bonis non* to *Richard*. *Henly* acted all along till that Time as Clerk in Court for the Plaintiff; and in that same Year of 1731 obtained another Revivor of the Order, that has been mentioned. From that Time till the Year 1740 *O'Bryan* made various Applications to *Staniford*, who was in some Measure an Agent for Mrs. *Thwaites*, in order that his Bill might be settled between them in an amicable Manner. But those Applications proving not very effectual, he thereupon determined that his Bill should be taxed before the Master; for that Purpose, in 1740, he served *Staniford* with the Master's Warrants; and *Staniford* not attending upon them, he got a Report *Ex parte*. As soon as he had done this, he endeavour'd to make a Demand upon Mrs. *Thwaites* for the Payment of the Money which was reported to be due to him. In order to do this he went to the House of *Turner*, who was her Son-in-law, wherein she lodged, and desired to speak with her. *Turner* refused to let him do it; and

Y y y

there-

thereupon he left with *Turner* the Demand in Writing, which was to the Purport before mentioned; but *Turner* told him, that he would not give it her. Soon after this he took out an Attachment for his Cofts, and had a *Non est invent'* returned upon it. He went through the other Proceffes of Contempt, till at laft he obtained an Order for a Serjeant at Arms. He took fome other Steps afterwards in order to obtain his Cofts, which did not prove effectual. And now it was moved, that the former Taxation of Cofts might be fet afide, together with the feveral Proceffes which had iffued in order to obtain them.

Lord Chancellor faid his Opinion was, That the Taxation of Cofts ought to ftand, but that the Attachment and the other Proceffes of Contempt ought to be fet afide. He faid, that here was a Woman very infirm, and *Turner* appears to have been the principal Perfon that managed her Affairs. *Staniford* acted in a good Meafure as her Agent. *Staniford* was ferved with Warrants from the Mafter in order to have attended on her Behalf, but he never did. 'Tis indeed true, that this was a Report obtain'd *Ex parte*; and if any Body offered on the Part of Mrs. *Thwaites* to undertake for Payment of the Cofts, his Lordship faid he fhould make no Scruple of ordering the Bill to be relaxed; but as there was no Body that would undertake to pay them, a Retaxation of this Sort ought not to be directed. As to the Manner which has been taken in order to recover thefe Cofts, his Lordship was of Opinion, that it was irregular. It is indeed true, that it has been contended on the Part of the Plaintiff, that *O'Bryan* ought to have taken out a *Subpœna* for his Cofts before he was intitled to have an Attachment for them; but that is more than was neceffary for him to have done. However, thus much he ought to have done, namely, to have ferved Mrs. *Thwaites* with the Order and with the Report before he could be intitled to his Attachment. This was the Practice of the Court before

Where the Bill of Cofts of a Solicitor fhall not be order'd to be retaxed, by reason that no Body will undertake to pay the Cofts which fhall appear to be due on fuch Retaxation.

When a Solicitor's Bill of Cofts is taxed he may take out an Attachment for them

I

without firft of all taking out a *Subpœna* for his Cofts.

A Solicitor muft ferve his Client with the Order for taxing his Bill of Cofts, and with the Mafter's Report, whereby fuch Cofts are afferted, before he can take out any Attachment for them.

fore the Statute of 2 G. 2. relating to the better Regulation of Attornies and Solicitors. But that Statute has made no Difference. For tho' the Words of that Statute are, *The said Party or Parties shall forthwith pay to the said Attorney or Solicitor respectively, or to any Person by him authorised to receive the same, that shall be present at the said Taxation*; and the Word *forthwith* has been relied upon to shew, that the Statute thereby intended to give a more summary Method for recovering the Costs than before; yet his Lordship said his Opinion always was, that the Method for recovering the Costs continued the same under the Act as before. For these Reasons his Lordship directed, that the Attachment in the present Case and all the other Processes of Contempt should be set aside, with Costs. He farther directed, that Mrs. *Thwaites* should be allowed to deduct those Costs out of the Costs which had been reported against her. And so his Lordship was pleased to order accordingly.

The Method
of Recover-
ing the Costs
due to a So-
licitor is not
alter'd by
2 Geo. 2.

D E

Termino S. Hilarii

1740.

In CURIA CANCELLARIÆ.

January 23.

Beckford and Beckford.

IN 1736 *Peter Beckford* made his Will at *Diepe* in *France*, and thereby devised his Estate to *Bathsheba Beckford*. This Estate lay in *Jamaica*. A short Time after making this Will he returned to *England*, and from thence went to *Jamaica*, at which Place he died very shortly. *Philip Beckford* was his Heir at Law, and on his Death took Possession of the Estate.

The present Bill was brought by *Bathsheba* against him, in order to perpetuate the Testimony of her Witnesses relating to this Devise.

To this Bill the Defendant put in his Answer, and thereby insisted upon two Matters by way of Defence; one, that the Testator did not duly execute the Will according to the Statute; the other, that he was not of sound Memory at the Time of the Execution of it.

In 1739, after putting in this Answer the Defendant went from *England* to *Jamaica*. On the 11th of *October* in that same Year, which was a short Time before his going there, he left an Affidavit with his Solicitor, that several Persons whose Names were mentioned in the Affidavit, and who resided in *Jamaica*, were material Witnesses for him, to shew that the Testator was not of sound Memory when he returned to *Jamaica* at the Time which has been mention'd. This Affidavit was left with his Solicitor in order to be made Use of, if there should be Occasion, and not otherwise. Since the Time of making it Publication was twice enlarged, once on the Application of the Defendant, the other Time, as it was said, on the Application of the Plaintiff; but at neither of those Times was this Affidavit made Use of, nor was it so much as mention'd, that the Defendant had any Occasion for a Commission to *Jamaica* to examine those Witnesses there, whose Names, as has been said, were mentioned in the Affidavit. The Time for Publication was to expire to Day; and now it was moved, upon the Foundation of this Affidavit, that the Defendant might have a Commission to *Jamaica* to examine those Witnesses there, and that Publication might be farther enlarged to the first Day of *Michaelmas* Term next.

Lord Chancellor was of Opinion, That this Motion ought not to be granted. He said, here is a Gentleman who is Heir at Law to the Testator, and is in Possession of his Estate. The Bill was brought in 1728; the Will is said to have been made at *Diepe*. The most material Proof that can arise in this Cause must arise from Witnesses who were at *Diepe* at the Time the Will was made, and who knew the State of the Testator's Mind there at that Time. No very strong Proof relating to this Matter can arise at *Jamaica*; for though the Testator went there soon after his returning from *Diepe*, and might there be guilty of Extravagancies, yet that Proof will not be very strong to shew that he was not in his right Mind at *Diepe*, where the Will

is said to have been executed. If the Witnesses, whose Names are mentioned in the Affidavit, were material for the Defendant, 'tis very extraordinary that they should not have been mention'd at either of those Times, when Publication was before enlarged. Nor is there any Likelihood that the Defendant will suffer Injustice by the Denial of this Motion. For he may bring his Ejectment in *Jamaica*, and may likewise file another Bill in the Court of Chancery there, to perpetuate the Testimony of those Witnesses residing there, notwithstanding the present Bill which is brought in this Court. Accordingly the Motion was refused.

A Bill may be brought in the Court of Chancery of *Jamaica*, to perpetuate the Testimony of Witnesses notwithstanding a Bill was brought for that Purpose before in *England*.

Jan. 23.

Adams and Bobun.

Charles Bobun was Governor of one of the *English* Settlements in the *East-Indies*, and at the same Time — Adams was Governor of another of them. The two Governors had several Dealings with one another, and the Account between them was never settled. Both the Governors died; the Plaintiff was representative of one of them, and the Defendant was representative of the other.

A Bill was brought in order that that Account might be taken. The Defendant put in his Answer, and thereby objected only to two *Items* in the Account, which was set forth in the Bill. Since the putting in this Answer, a Motion was made by the Defendant in order to have a Commission to the *East-Indies* to examine *Thomas Walters*, who was a Kind of Secretary to *Charles Bobun* in Relation to those two *Items* in the Account. That Motion was refused upon these two Grounds; one, that in a Bill of this Sort, wherein no Account is pretended to be settled, a Commission of this Kind is not in the Nature of it proper to be granted before the Hearing of the Cause; the other, that the Affidavit was not certain enough.

The Affidavit was now amended, and thereupon the Motion was made again.

Lord Chancellor said his Opinion was, That this Motion ought not to be granted. He said the Course of the Court is, that where an Account must necessarily be directed at the Hearing, a Commission before the Hearing shall never be granted to examine Witnesses beyond Sea, when the granting such Commission will delay the directing the Account. And the proper Time to apply for such Commission is after the Account is directed. The material Point therefore insisted on for the Defendant is, that there are but two *Items* in the Account in Question, which he disputes. And if those *Items* could be determined without directing an Account, there might be Reason possibly for granting the Commission which is asked. But this is such a Case as in the Nature of it requires, that an Account should be directed, in what-ever Way the *Items* in Question be determined. If there had been a stated Account, and a Bill brought, in order to open that Account, on particular Errors suggested, there might have been Reason for granting the Commission in Question, provided the Witness that is beyond Sea was the only Person that could depose in Relation to those Errors; but no such stated Account is pretended to be in the present Case. It has been indeed offer'd, that the Defendant will go to Hearing at the Time that otherwise he would, notwithstanding such Commission should be granted. But that Offer will not vary the Case; for in the Nature of the Thing the granting such Commission must of Necessity suspend Publication, and no Consent almost can alter that Matter. His Lordship said, that he never knew a Commission of this Sort granted in such a Case as the present one; accordingly the Motion was refused.

The Course of the Court is, that where an Account must necessarily be directed at the Hearing, a Commission before the Hearing shall never be granted to examine Witnesses beyond Sea, when the Granting such Commission will delay the directing the Account; and the proper Time to apply for such Commission is after the Account is directed.

Where a Commission shall not be granted to examine Witnesses beyond Sea, notwithstanding the Party consents to go to Hearing at the same Time, as if such Commission was not granted.

Jan. 24.

Wallis and Hodson.

*J. C. Burn. Eccles.
Law Tit. Wills. &
seems to be same
report; tho' not
cited as such.*

J. C. 2. Atk. 115.

JAMES Wallis, an Inhabitant of the Province of York, died Intestate, leaving a Wife and one Son, *Towers Wallis*. At the Time of his Death his Wife was enseint with a Daughter. *Towers Wallis* died after his Father, and then the Mother was deliver'd of a Daughter named *Elizabeth*. After this the Widow intermarried with *Charles Hodson*. And now the present Bill was brought by *Elizabeth* the Daughter, against *Charles Hodson* and his Wife, praying, amongst other Things, an Account of the personal Estate of *Towers Wallis*, and that that Estate might be divided into two Moieties, the one to the Plaintiff, the other to the Wife of *Charles Hodson* the Defendant. There was a Cross Bill filed on the Part of the Defendants, praying that the whole personal Estate, which belong'd to *Towers Wallis*, might be decreed to the Wife of *Hodson*.

A posthumous Child shall be intitled within the Statute of 1 Jac. 2. c. 17. to a Share in a Brother's or Sister's personal Estate equally as if such Child had been born in the Life of the Brother or Sister.

At the Hearing of this Cause, *Lord Chancellor* thought it was a Matter of some Difficulty; whereupon he directed it to stand over; and now he was pleased to deliver his Opinion in it. He said his Opinion was, that *Elizabeth* was intitled to a Moiety of the personal Estate of her Brother *Towers Wallis*, notwithstanding she was born after his Death. This is a Question which depends upon the Statute of 1 Jac. 2. cap. 17. sect. 7. the Words of which Statute are, *Provided also, and it is farther enacted by the Authority aforesaid, that if after the Death of a Father any of his Children shall die Intestate, without Wife or Children, in the Life-time of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with her, any Thing in the last mentioned Act to the contrary notwithstanding.* If the Plaintiff Sister had happened to be born before the Death of her Brother, without Controversy she would have been intitled to a Share of the personal Estate of her Brother, equally with her Mother. The only Doubt

Doubt is, inasmuch as she was a posthumous Child born after her Brother's Death. But his Lordship's Opinion was, That that Circumstance would make no Difference. It has been admitted by the Counsel for the Defendant, that upon the Statute of *Car. 2.* commonly called *The Statute of Distributions* in Successions *ab intestato* from a Father to his Children, a posthumous Child shall have the Benefit of a Share of the personal Estate of the Father equally with the other Children. This is agreeable to the Intent of that Statute, and to that Debt of Nature which Parents owe their Children; nor will any Inconvenience arise from this, because the Event of there being such Child must happen in a reasonable Time. It has been objected, that in collateral Successions *ab intestato*, as between Brothers and Sisters, Uncles and Nephews, there is no such Debt of Nature. It has been said farther, that the distributary Share must vest in the Party at the Time of the Death of the Intestate, or not at all. And it has been urged, that great Inconvenience would follow from a Determination that the Estate was not then vested, and that the Vesting might be postpon'd, or broke in upon and varied by a subsequent Event. And in order to particularise and specify an Inconvenience of this Sort that might happen, the Case of the Half Blood has been put. It has been said, that the Half Blood is equally intitled to take with the Whole, that a Mother might marry a second Husband, that by that Means there might be more Brothers and Sisters born; that this might be at a Distance of Time, and that in this way the Distribution of the Parties Estate might perpetually vary. These are the several Objections that have been made; and his Lordship said he would consider them separately in the Order which they stand in. The first of these is, That there is no Debt of Nature in collateral Successions; but that Circumstance is of no Weight. In the Case of lineal Successions, where that Observation has been made Use of as an Argument for giving a Share to the posthumous Child, that has been only an additional corroborative Reason; and the primary Reason has been the Intention of the Statute to preserve the Estate of the Father amongst his own Children.

A posthumous Child shall claim the Benefit of a Share in the personal Estate of a Father equally with another Child.

Where the Circumstance of there being a Debt of Nature is only a corroborative Reason, and not the primary one.

How far it is not necessary, that an Interest in personal Estates should vest in the Party on the Death of an Intestate.

How far the Half Blood are capable of taking within the Statute of *Jac. 2.*

A posthumous Child is capable of taking in lineal Successions *ab intestato*.

Those of the Half Blood are capable of taking in Successions *ab intestato* within the Statute of *Car. 2.* equally with the Whole Blood.

An Infant *in ventre sa mere* is capable of taking within the Statute of *Jac. 2.* equally with other Persons.

How far an Infant *in ventre sa mere* is capable of taking equally with other Children.

The second Objection has been, That the Estate must vest on the Death of the Intestate; and it is indeed true, that this is generally laid down in — 53. in 1 *Vern.* 403. and in 2 *Vern.* 274. But this Objection is of equal Weight in the Case of lineal Successions *ab intestato*, as it is in collateral ones; yet there it has never been allowed. And this appears by the Opinion of Lord *Raymond*, in the Case of *Edwards* and *Freeman*, reported in 2 *Will.* 446.

The third Objection has been, That according to this Doctrine a posthumous Child of the Half Blood would be able to take, and that, it has been said, would introduce many Inconveniences. His Lordship said, it was very true it has been long determined, that on the Statute of *Car. 2.* which has been mentioned, the Half Blood shall take equally with the Whole. That Point was finally so settled in *Showers's Parliament Cases* 108, where all the Learning upon that Head is collected together. But his Lordship said he did not find that this Point was ever adjudged on the Statute of *Jac. 2.* that a Brother of the Half Blood should take as Representative to the Brother deceased. In the Case of *Wats* and *Cowton* this Point was mentioned *arguendo*, and many probable and reasonable Arguments given for that Side of the Question; but there was no Decision of the Point. And his Lordship said he would give no Determination about it, but would leave that Point unprejudiced whenever it should arise. Having just given an Answer to these Objections his Lordship said, That the principal Reason upon which he founded his Opinion in the present Case was, That the posthumous Sister was *in ventre sa mere* at the Time of the Death of her Brother, and consequently was a Person *in rerum Natura*. Upon this Ground it is, that by the Rules of the Common and Civil Law she was capable of taking in Succession. By the Rules of the Common Law an Infant of this Kind may be vouched in a common Recovery, and in Behalf of such an Infant a Mother may

may justify Detention of Charters. And in 2 *Vern.* 711. it was held, that on Behalf of such an Infant, a Bill might be brought, and an Injunction granted to stay Waste. So in the Construction of Wills and Uses an Infant of this Sort is capable of Taking. For notwithstanding the Case of *Slow* and *Cuttler* it is now settled, that such an Infant is capable of taking by Devise; and of that Opinion were two Judges in the Case of *Scattergood* and *Edge*, according to a Manuscript Report which he had of that Case. But though this was so, yet every Body knows that that, which gave Rise to the Statute of *Car. 2.* which has been mentioned, was the Contention which was then depending between the Temporal and Ecclesiastical Courts, in Relation to the Power which the Ecclesiastical Courts at that Time exercised of compelling Distributions, and taking Bonds for that Purpose. The Rise and Progress of this Dispute is mentioned in 3 *Mod.* 58. and in *Raymond* 496. That Statute has ascertained that Point in Favour of the Ecclesiastical Courts; and the most material Clauses in that Statute are relative to their Laws and the Course of Proceeding in their Courts. In the third Section of that Statute it is said, "That the Judges of those Courts shall order and
 " make just and equal Distribution of what remaineth clear
 " after all Debts, Funerals and just Expences of every Sort
 " first allowed and deducted, amongst the Wife and Chil-
 " dren, or Childrens Children, if any such be, or other-
 " wise to the next of Kindred to the dead Person, in equal
 " Degree, or legally representing their Stocks *pro suo cui-*
 " *que jure*, according to the Laws in such Cases, and the
 " Rules and Limitations hereafter set down, and the same
 " Distributions to decree and settle, and to compel such
 " Administrators to observe and pay the same by the due
 " Course of his Majesty's Ecclesiastical Laws." Several Expressions in this Clause shew, that the main Design of the Act was, as has been mentioned, to make the Exercise of that Jurisdiction in the Ecclesiastical Court legal, which, before

A Bill may be brought, and an Injunction may be granted to stay Waste in Behalf of an Infant *in ventre sa mere.*

An Infant *in ventre sa mere* is capable of taking by Deed or Will.

The Contests between the Temporal and Ecclesiastical Courts, in relation to the Ecclesiastical Courts exerting a Power of compelling a Distribution of Intestates Estates, gave Rise to the Statute of *Car. 2.*

The most material Clauses in the Statute *Car. 2.* are relative to the Ecclesiastical Law, and the Course of Proceeding in the Ecclesiastical Courts.

The Intention of the Statute of *Car. 2.* was to make the

Exercise of that Jurisdiction legal, concerning Distributions, which before that Time was condemned in the Temporal Courts.

The Statute of *Car. 2.* is to be construed according to the Rules of the Canon and Civil Law, and not according to the Rules of the Common Law.

That Part of the Statute of *Jac. 2.* which relates to the Distribution of Intestates Estates, must be construed according to the Civil and Canon Law.

Statutes made *in pari materia* are to be construed one into another.

The Statute of *Jac. 2.* is to be construed in the same Manner as if the Statute of *Car. 2.* was re-enacted in it.

By the Civil

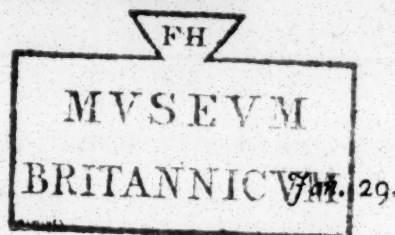
Law an Infant *in ventre sa mere* is considered as in *Esse* in such Respects as are for the Benefit of such Infant, though not in those which are to his Prejudice.

before that Time, was condemned in the Temporal Courts. And in the Case of *Smith* and *Tracy*, which has been cited, Lord Chief Justice *Holt*, who was then of Counsel with one of the Parties, argued strongly, that that Statute was not to be construed by the Rules of the Common Law, but by the Rules of the Canon and Civil Law, and a Consultation was there awarded. In the Case of *Carter* and *Crawly* likewise it was held, that that Statute was Directory to the Ecclesiastical Courts, and that it was grounded principally on their Law, and the Practice of their Courts. In the Case of ----- which was at the Rolls, his Honour was of Opinion, that that Statute was to be construed according to the Civil and Canon Law; and afterwards, upon an Appeal, Lord *King* agreed to that Opinion. That Statute of *Car. 2.* confirms the Jurisdiction of the Ecclesiastical Courts, which has been mention'd, and enlarges it; it sets up the *Collatio bonorum* which the Civil Law allows of. As this is so, the Statute of *Jac. 2.* must be construed by the Civil and Canon Law likewise. In 1 *Ven. 244.* Lord *Hale* was of Opinion, that Statutes made *in pari materia* were to be taken into the Construction of one another; and that the Statute of 14 *Eliz.* relating to Church Leases, was a Kind of Appendix to 13 *Eliz.* relating to the same Matter. And this Rule of Construction holds more strongly in the present Case than it did in that; for this Statute is a Continuance of the Statute of *Car. 2.* with three additional Clauses; and therefore it is to be considered as if the Statute of *Car. 2.* was repeated and re-enacted in it. As this is so, it must be inquired into, what the Civil Law is in this Particular. And by that Law an Infant *in ventre sa mere* is considered as in *Esse*, in such Respects as are for the Benefit of such Infant, though not in those which are to his Prejudice. This appears by various Passages in the *Digest*, Title the 5th, Law the 7th; in the same Book, Title ----- Law 26. in *Justinian's Institutes*, lib. 2. Title the

the 1st *De* in the same Book, *Lib. 2. Title 7.*
 Law 9. in the 27th Book of the *Digest*, Title 9. Law 7.
 in the 38th Book of the *Digest*, Title 8. Law 1. *sect. 8.* in
 the 37th Book of the *Digest*, Title 1. Law 2. *sect. 2.* and
 which Passages his Lordship particularly repeated.

In the present Case the Question meerly is *De commodo ip-*
sius partis, and no way relates to the Prejudice of the In-
 fant. And so his Lordship was pleased to decree accord-
 ingly.

Barker and Dumeres.



Robert Dumeres died Intestate, and on his Death *Ed-*
ward Dumeres, who was a Relation of his, apply'd
 for Administration. *Barker*, who was a Creditor of *Robert*
 by Bond, opposed the Granting of the Administration to *Ed-*
ward by Reason of his Insufficiency, and his Intention of
 going over to *Jersey*. However Administration was granted
 to him. This Administration was in some Measure granted
 to *Edward* by the Leave of this Court. *Barker* had entered
 a Caveat against its being granted to him, though that Ca-
 veat was afterwards withdrawn. But as there were these
 Objections against him, *Barker* filed his Bill against him
 the 31st of *October* last, for the Payment of his Debt, and
 prayed that he might give Security to abide that Determi-
 nation.

His Answer came in the 27th of the next Month, and
 an Order was made, that he should find such Security,
 which he accordingly did.

After this *Merry*, who was another Bond-Creditor to the
 Intestate, brought his Action at Law against *Edward*, and
Edward confessed a Judgment to him in *Michaelmas* Term in
 that same Year in 4000*l.* This occasion'd *Barker's* bring-
 ing his Action at Law against *Edward* upon the same
 Bond for which the Bill was brought here, in order that

Edward might not confess Judgments to other Persons before he could get Judgment against him.

As soon as this Action was brought, a Motion was made on the Part of *Edward*, praying that *Barker* might make his Election, which Court he would proceed in, whether at Law or in Equity; and an Order was made for that Purpose accordingly. Thereupon *Barker* amended his Bill, by suggesting that *Edward* had confessed the Judgment to *Merry* collusively; and to this Bill made *Merry* a Defendant. But before that *Merry* was ever serv'd with a *Subpœna* to answer this amended Bill, a Motion was now made on the Part of *Barker*, praying that the Order might be discharged by which he was obliged to make his Election.

Lord Chancellor said his Opinion was, that this Order ought to be discharged. He said it was very true, that it was the general Rule of the Court, that a Person shall not be allowed to proceed both at Law and in Equity for one and the same Demand at one and the same Time. But notwithstanding that, it is as certain, that by the antient Course of the Court a Person was allowed to bring his Action at Law against the Representative of a Deceased, and at the same Time to bring his Bill here in order to have a Discovery of Assets. Though now it is established, that if the Party proceeds in Equity against such Representative, his Bill must be both for a Discovery of Assets and a Satisfaction for his Debt; and he shall not be allowed to proceed both at Law and in Equity. And where the Party has proceeded in both Courts, several Orders have been requiring him to make his Election. But where the Court sees that the Representative is confessing Judgments, that is a Reason (and his Lordship said, in his Judgment shall always be a Reason) that the Court will not require the Party to make his Election. The Courts of Law distinguish the Case of Executors, in Instances

By the antient Course of the Court a Person was allowed to bring his Action at Law against the Representative of a Deceased, and at the same Time to bring his Bill here in order to have a Discovery of Assets.

When a Creditor sues an Executor at Law, and at the same Time files his Bill against him in Equity,

Equity will not require him to make his Election in which of the Courts he will proceed, in Case the Executor is attempting to prefer other Creditors before him, by confessing Judgments to them.

stances fimilar to this, from other Cafes. Therefore though the constant Courfe of thofe Courts is on reasonable Circumftances to give a Defendant farther Time to plead, than he is obliged to plead in by the ftrict Rule of the Court, yet when an Executor applies for this Favour, the Time for Pleading fhall not be enlarg'd, but by his Confenting not to confefs Judgments in the mean Time. 'Tis indeed true, that an Executor in fome Inftances may honeftly confefs Judgments to other Creditors; as where he does it to prevent his being doubly charg'd, or the like; but when this Court fees that he does this in order to elude its Orders, the Court will never permit it. Now what is the Nature of the prefent Cafe? The original Bill was filed the 31^{ft} of *October* laft. The Answer of *Edward* came in the 27th of *November* following; and in the Beginning of *Michaelmas* Term here is a Judgment confefled by *Edward* to *Merry* in 4000 *l.* The Adminiftration it felf was in fome Meafure granted to *Edward* by the Leave of this Court. *Barker* had enter'd a Caveat againft its being granted to him, tho' that Caveat was afterwards withdrawn. The proper Order for the Court to make in this Cafe, his Lordfhip faid, was, that *Barker* fhould make a fpecial Election, namely, to proceed at Law to recover Judgment there, and to proceed in this Court for a Difcovery, and an Account of Affets, but that he fhould not be at Liberty to take out Execution upon the Judgment, without Leave of this Court; and fo his Lordfhip was pleafed to order accordingly.

Where the Courts of Law will not give an Executor Time to plead, unlefs he agrees not to confefs Judgments to other Creditors in the mean Time.

Where an Executor may honeftly confefs Judgments to other Creditors.

Hatton and Marr.

Jan. 29.

THE Defendant fet forth a Deed in his Answer, which was attended with Suspicion of Forgery, but did not offer by his Answer to produce the Deed before his Clerk in Court, in order that the other Side might infpect it. It was now moved, that he might produce it before his Clerk in Court for that Purpofe.

Lord

Though the Defendant does not offer by his Answer to produce a Deed, yet the Court will order

Lord Chancellor said, though the Defendant does not offer by his Answer to produce a Deed, yet the Court will order him to leave it with his Clerk in Court, to be inspected by the other Side, where-ever there is a Suspicion of its being forged. And accordingly the Motion was allowed.

him to leave it with his Clerk in Court, to be inspected by the other Side, where-ever there is a Suspicion of its being forged.

Jan. 29.

Anonymus Case.

THE Defendant had put in a Plea and Answer both to this Bill; after they were so put in, the Plaintiff laid by above three Terms, without taking any farther Proceedings.

It was now moved, that the Plaintiff's Bill might be dismissed for Want of Prosecution.

Where-ever there is a Plea put in to a Bill, tho' there is an Answer likewise, the Bill cannot be dismissed for Want of Prosecution till the Plea is argued.

Lord Chancellor said, That where-ever there is a Plea put in to a Bill, though there is an Answer likewise, the Bill cannot be dismissed for Want of Prosecution till the Plea is argued. Accordingly the Motion was refused.

Bill cannot be dismissed for Want of Prosecution till the Plea is argued.

Jan. 31.

Vernon and Vaudrey.

GEORGE *Vernon* had one Son and two Daughters, *Henry*, *Anna-Catherina* and *Matilda*. In 1702, *George Vernon* died, leaving his three Children before-mentioned, who were all at that Time Infants.

On the Death of *George*, *Catherina* the Widow acted as Guardian to her Children, being appointed so by the Will of her Husband. In 1703 a Treaty of Marriage was set

on Foot between *Henry* and *Anne* the Daughter of *Mary Pigot*; they were both Minors, and Marriage-Articles were entered into to the following Effect. " The Articles were
" made between *Henry* of the first Part, *Catharina* and
" *Thomas Vernon*, who was Uncle of *Henry*, of the second
" Part, *Anne Pigot* of the third Part, and *Richard Vernon*,
" who was Guardian to *Anne*, of the fourth Part. By
" these Articles *Catharina* and *Thomas*, on the Behalf of
" *Henry*, did covenant with *Richard*, in Consideration of
" the then intended Marriage, that *Henry* should, with-
" in one Month next after he should attain the Age of
" twenty-one Years, or sooner, if an Act of Parliament
" could be obtained to enable him thereto, at his own
" Charge, by such Ways and Means as *Richard Ver-*
" *non* or his Counsel should advise, sufficiently con-
" vey, limit and settle all and every his Manors, Lands
" and Hereditaments in the Counties of *Derby* and
" *Stafford*, free from all Incumbrances, by or under
" *George Vernon*, (*Catharina's* Jointure, and other Incum-
" brances of *George*, to the Value of 5000 *l.* only ex-
" cepted) To the Use and Intent that *Anne Pigot* should
" receive for her own separate Use 100 *l. per Annum*,
" and afterwards the farther yearly Sum of 100 *l.* amount-
" ing in all to 200 *l.* payable upon such Contingencies,
" as therein mentioned, and subject to the separate Main-
" tenance-Money, to the Use of *Henry Vernon*, for his
" Life, without Impeachment of Waste, Remainder to
" Trustees to preserve contingent Remainders, Remainder
" as to so much as would let at 600 *l. per Annum*, free
" from Incumbrances, to the Use of *Anne Pigot* for Life,
" for her Jointure, and in Bar of Dower, and from and after
" the Decease of *Henry*, as to so much of the Residue of the
" Premises as should be worth 500 *l. per Ann.* in Posses-
" sion, to the Use of the Trustees for 100 Years, upon
" Trust for raising any Sums not exceeding 5000 *l.* to
" discharge and indemnify *Catharina Vernon* and *Thomas*
" *Vernon* from all Sums which they had or should undertake
" to pay on Account of *George Vernon*, or wherewith any

“ Part of the Premisses then stood charged; and after-
“ wards for all such Sums as *Henry* should owe at his
“ Death; so as such Debts do not exceed the farther Sum
“ of 5000 *l.* and also upon farther Trust for Provision of
“ younger Children, as follows. If any elder Son,
“ and but one younger Child, Son or Daughter, then
“ 3000 *l.* for such Son or Daughter; if more, then
“ 5000 *l.* betwixt them, and as soon as the Estate before
“ limited in Jointure should determine, to the Use of
“ the first and every other Son of *Henry*, on the Body of
“ *Anne Pigot* to be begotten in Tail Male successively, and
“ for Want of such Issue, as to so much of the Premisses
“ as should be worth 500 *l.* per *Ann.* in Possession, to the
“ Use of the Trustees for twenty-one Years, upon sever-
“ al Trusts long since determined, Remainder to the
“ first and every other Son of *Henry*, by any after-
“ taken Wife in Tail Male successively, Remainder to
“ the Daughters of *Henry* on the Body of *Anne Pigot* in
“ Tail general, Remainder to *Henry* and his Heirs for ever.
“ By these Articles *Catharina* and *Thomas Vernon* did
“ covenant with *Richard Vernon*, that *Catharina* and *Thomas*
“ would, after the Solemnization of the Marriage, pay all
“ such Debts as were owing by *Mary*, late Mother of *Anne*
“ *Pigot*, at her Death, or which she by her Will should
“ desire her Daughter *Anne* to pay, with Interest for such
“ Debts as were payable with Interest, and would pay
“ *Richard Vernon* all Sums due to him on Account of the
“ Guardianship of *Anne Pigot*, or the Trust reposed in him
“ by *Mary* and *Thomas Pigot* the Father of *Anne*. In Consi-
“ deration whereof, and the better to enable *Catharina*
“ and *Thomas Vernon* to perform their Part of the Ar-
“ ticles, *Richard Vernon* covenants with *Catharina* and
“ *Thomas Vernon*, that after the Marriage had, he
“ should and would upon Request grant, assign and
“ deliver to *Catharina* and *Thomas Vernon*, for the Use of
“ *Henry*, or otherwise vest in him all the Messuages,
“ Lands and Tenements, and personal Estate which was
“ granted or vested in him, by or under *Mary* the Mother of
“ *Anne*

“ *Anne Pigot*, except such Goods as had been sold since her
 “ Death, and should and would faithfully account with them
 “ for all such Sums which *Richard* had received since the
 “ Death of *Mary*, by Rents and Profits of her Estate, or by
 “ Sale of any of the Goods and personal Estate. And it was
 “ agreed between the Parties, that in case the Marriage took
 “ Effect, and in case that the Manors, Lands, &c. where-
 “ of *Peter Venables* died seised should come to *Anne Pigot*, that
 “ *Anne* should in six Months after she attained Twenty-one
 “ join with *Henry Vernon* to settle the same to the Uses fol-
 “ lowing; namely, as to so much thereof as would let at
 “ 500*l.* per Ann. or thereabouts, to the Use of *Anne Pigot*, her
 “ Heirs and Assigns for ever; and as to all the Rest, to the
 “ Use of *Anne Pigot* for Life, without Impeachment of Waste,
 “ Remainder to *Henry Vernon* in like Manner, Remainder to
 “ the first and other Sons of *Anne* and *Henry* in Tail male,
 “ with Power for Charging and Raising Portions for Daugh-
 “ ters, younger Sons, and with such Remainder over as *Anne*
 “ *Pigot* should think fit to have expressed.” As soon as
 these Articles were made the Marriage took Effect.

On the 17th of *April* 1707 *Henry* came of Age. On
 the 2d of *May* in that same Year *Henry* and *Richard* settled
 an Account together, the Vouchers of that Account having
 been before delivered by *Richard* to *Henry*; and the Day
 following they settled another Account, which last was un-
 der Seal. On the 5th of *June* following an Indorsement was
 made on the Articles beforementioned in the Words following,
 that is to say, “ Whereas the within named *Henry Vernon*,
 “ *Anne* his now Wife, formerly *Anne Pigot*, *Cath. Vernon*, *Tho.*
 “ *Vernon* and *Richard Vernon*, have well considered, and
 “ found before such Time as *Henry Vernon* attained his
 “ Age of Twenty-one Years, that the Articles of Agree-
 “ ment Quadripartite indented, made between *Henry*
 “ *Vernon*, *Anne* his Wife, by the Name of *Anne Pigot*,
 “ *Cath. Vernon*, *Thomas Vernon* and *Richard Vernon*, and
 “ bearing Date the 20th Day of *May* which was in the
 “ Year of our Lord 1703, contained in four Skins of
 “ Parch-

“ Parchment, upon and before the Marriage of the said
 “ *Henry Vernon* with the said *Anne Pigot*, cannot be per-
 “ formed as to the greatest Part of them, by the said *Henry*
 “ *Vernon*, the Debts and Legacies of his late Father *George*
 “ *Vernon*, Esq; deceased, amounting to much more than
 “ the said Parties to the said Articles till of late apprehend-
 “ ed; now therefore the said *Henry Vernon*, with the Pri-
 “ vity of the said *Cath. Vernon*, *Thomas Vernon*, the said
 “ *Anne* and *Richard Vernon*, testified by their Signing and
 “ Sealing of these Presents, hath declared and expressed,
 “ and hereby doth declare and express, that he cannot per-
 “ form the aforementioned Articles for the Reason afore-
 “ mentioned, nor doth he mean to endeavour at so im-
 “ practicable a Thing as at present the Performance there-
 “ of doth appear to be; and therefore he the said *Henry*
 “ *Vernon* doth for himself and his Heirs declare, that he
 “ will not hold the within mentioned Manors and Heredi-
 “ taments in any Manner liable to the said Articles, or
 “ any of the Agreements therein contained or intended,
 “ nor will do any Thing in pursuance of the same. In
 “ Witness whereof the said *Henry Vernon*, *Cath. Vernon*,
 “ *Tho. Vernon*, the said *Anne* and *Richard Vernon* have here-
 “ unto set their Hands and Seals this 5th Day of *June*, in the
 “ Year of our Lord 1707. *Henry Vernon*. Sealed and deliver-
 “ ed by the above-named *Henry Vernon*, in the Presence of
 “ *William Longueville*, *Edward Porter*, *Thomas Watson*.” This
 Indorsement was executed by *Henry* only, and not by any
 of the other Parties therein mentioned; and there were
 suspicious Circumstances attending the Indorsement it self.

On the Day following another Deed was made between
Henry Vernon of the one Part, and *Cholmondeley* and *Richard*
Vernon of the other Part, “ whereby *Henry* covenanted with
 “ *Richard Vernon* only, and his Heirs, to levy several Fines
 “ with Proclamations, of all his Manors, Lands and Heredi-
 “ taments in the Counties of *Derby* and *Stafford*, and decla-
 “ red the Uses thereof to be to the Use of *Henry Vernon*,
 “ *Richard* and *Cholmondeley*, their Heirs and Assigns, in Trust
 “ that

“ that they or the Survivor of them, or the Heirs of such
 “ Survivor, should or might by any Writing under their
 “ Hands sell, charge, lease, mortgage, limit or appoint
 “ all or any of the Premises in Possession, Reversion or Re-
 “ mainder to any Person, or for any Estate, or in any other
 “ Ways, or any other Manner whatsoever, in order for Rai-
 “ sing or Charging any Sum which should be needful on any
 “ Occasion relating to the Debts and Legacies of *George Ver-*
 “ *non*, or unto the Debts of *Henry Vernon*, which he then or
 “ should thereafter owe, and till the same Sale, Charge,
 “ Mortgage, &c. should be made; and so long as *Henry Ver-*
 “ *non* should fail in paying any Sum or Sums, Mortgage or
 “ Bond, as he should enter into for Payment of Monies, and
 “ *Cholmondeley* and *Richard*, or either of them, should think
 “ fit, to take the Rents and Profits of the Premises, in
 “ Trust to permit *Henry Vernon* to receive the same
 “ during his Life; and upon farther Trust, that *Henry*
 “ *Vernon* by any Deed sealed and delivered in the Presence of
 “ Two or more Witnesses, with Consent in Writing by *Chol-*
 “ *mondeley* and *Richard Vernon*, or of *Richard Vernon*, or the
 “ Survivor of them, to be sealed and delivered by them the
 “ said *Cholmondely* and *Richard Vernon*, or the Survivor of
 “ them, in Presence of Two or more Witnesses, might from
 “ Time to Time, subject unto such Sales, Charges, &c. as
 “ should be before that Time made as aforesaid, settle and
 “ assure the Premises to such Persons, Uses and Estates, as
 “ *Henry Vernon*, with such Consent as aforesaid, should think
 “ fit, and in Default thereof, to the Use of *Henry Vernon*, his
 “ Heirs and Assigns for ever.” *Cholmondeley never knew that*
there was such a Deed, and Richard kept it to himself.

In pursuance of this Deed a Fine was afterwards levied ac-
 cordingly. In 1714 *Anne* died, leaving one Son, *George*
Venables Vernon, and one Daughter, *Anna-Catharina*. In
 the Year following *Henry* had a Mind to marry again, and
 a Treaty of Marriage was set on Foot between him and
 — the Daughter of — *Wright*. *Richard* had a

strong Inclination to break off this Match; and for that Purpose, on the 27th of *March* in that same Year, he writes a Letter to *Henry*, whereby he tells him in general, that an Action of this Sort will be very Inconvenient to him; and in the Postscript adds, “ If you have any Doubt how
 “ far the Marrying her will be inconvenient to you, I’ll
 “ then enumerate the Particulars, whereby to demonstrate,
 “ that it will not be in the Power of all your Friends to
 “ save you from being pulled to Pieces and Undone, if
 “ you marry there, or indeed any were else at present;
 “ and depend upon it, those who can entertain such
 “ Thoughts, or advise you to it, either are ignorant of
 “ your Affairs, or are not your Friends.” On the 6th of *April* following he writes him another Letter, whereby he tells him, “ I beg you’ll give me leave to be more particu-
 “ lar; the Debts you are in are near 15000 *l.* which would
 “ have made you very Uneasy before this Time, had the
 “ World known, especially those that lend you Money,
 “ that since your coming to Age you ratified the Settlement
 “ made at your Marriage, whereby you have no Power
 “ over the Estate; this has been concealed not only from
 “ your Relations, but every Body else to this Day, that
 “ you might have it in your Power to make Things easy
 “ till the *Kinderton* Estate shall fall into the Family, other-
 “ wise the paternal Estate, which now lies all within a Ring,
 “ and as it is together is the most noble and delightful,
 “ would by this Time have been torn to Pieces, and you
 “ made very uneasy. I believe those, who now are the
 “ Promoters of this Match, did they know the Circum-
 “ stances you are in, would be of another Opinion, than
 “ to think of such a ridiculous Marriage for you.” And in the Postscript he says, “ Pray don’t mention at present
 “ the Estate being settled.” On the 2d of *May* following he writes him another Letter wherein he tells him, “ I in-
 “ sisted they, meaning *Cath.* and *Thomas*, should enter into
 “ Covenants and Bonds previous to the Marriage, that you,
 “ at your coming to Age, should settle your own Estate to
 “ the Uses, and upon the Terms agreed upon; and such
 “ were

“ were their Regard for you, that they rather chose, and
 “ readily came into these Obligations, than lose the Op-
 “ portunity of so great a Fortune to you and your Fa-
 “ mily. Upon these Terms I consented, and the Mar-
 “ riage took Effect, and therefore at your coming to Age
 “ in *May* 1707, in pursuance of my Trust, I required
 “ your Assent to, and Confirmation of the Marriage Arti-
 “ cles, which you very justly complied with. And I now
 “ send you the inclosed Copy of the Deed that you exe-
 “ cuted for that Purpose, whereby you’ll find, that you
 “ are only Tenant for Life of your whole Estate, with
 “ Remainder to your Son, the Issue of that Marriage.
 “ But after this was done, your Debts, which are great,
 “ pressing you very much, I rather chose to keep these
 “ Things dormant, that you might borrow Money upon
 “ the Estate, than to suffer you to be exposed in the
 “ World, not doubting but that in due Time this Estate of
 “ *Kinderton* would fall in to extricate you out of these
 “ Difficulties, and now we have seen the happy Day. But
 “ I would have your Son and the World kept in the Dark
 “ as to the Settlement of the Estate.”

In the same Month *Richard* drew up a Case for the
 Opinion of Counsellor *Vernon*, wherein it was stated, that
Henry after he came of Age executed a Deed ratifying the
 Articles; and the Opinion of that Counsel was in these
 Words; “ Mr. *Henry Vernon* having, after he attained his
 “ Age of Twenty-one, with the Privy of his Mother
 “ and Uncle, confirmed the former Articles, I think he
 “ will be obliged to make a Settlement pursuant thereunto,
 “ and that the Infant Son and Daughter by their *Prochein*
 “ *Amy* may bring a Bill in Equity to inforce the Making a
 “ Settlement according to the said Articles, although the
 “ Articles seem to run very hard upon Mr. *Vernon*, that
 “ unless his Son dies he has no Power to make a Jointure
 “ to a second Wife, yet it is proper for the Trustees to
 “ make Application to Mr. *Vernon* to make such Settle-
 “ ment.”

On

On the 26th of the same Month *Richard* wrote *Henry* another Letter, wherein he tells him to the following Effect. “ At your Marriage all that could be done was to
 “ enter into Articles with your Mother and Uncle for
 “ your making a Settlement on your coming of Age,
 “ which being done by them, it was incumbent as well
 “ upon them as me to require the Confirming of them,
 “ which you did at your Age of Twenty-one. This be-
 “ ing done I should long ago have required a Settlement
 “ from you, but through the Necessity of your Affairs, as
 “ well as the Confidence which I had of your prudent
 “ Conduct, I have been but too dilatory therein; but
 “ now that you are so far advanced in a Treaty of a
 “ second Marriage, it is highly requisite I should require
 “ from you a Settlement pursuant to the Marriage Agree-
 “ ments, as well as give Notice to the Lady of the
 “ Covenants you are under to make such Settlement,
 “ that she may not be deceived under a Notion that your
 “ Hands are at liberty.”

On the 28th of the same Month *Richard* sent a Letter to *Anna-Cath.* the Sister of *Henry*, wherein he tells her to the following Effect. “ I received your Letter by your
 “ Maid on *Wednesday* last. That Day I got Mr. *Vernon*’s
 “ Opinion upon the Marriage Articles, a Copy whereof I
 “ here send you, that the Estate is secure, and that he
 “ can make no Settlement upon another Wife. Mr. *Ver-*
 “ *non* advised farther, that we should give Mrs. *Wright* a
 “ Copy of it, which your Uncle did the next *Monday*
 “ in Presence of the Lady *Furnese*. He read the Case
 “ and Opinion, and explained the Whole to them.
 “ My Lady *Furnese* affirmed he always assured her,
 “ that his Estate was in his own Power, but since it
 “ was not, she would have nothing to do in it. The
 “ next Day I saw Mr. *Wright* himself, and asked him, If
 “ he had seen Mr. *Vernon*’s Opinion? He told me he had,
 “ and that he was surprised at it, because Mr. *Vernon* had
 “ all

“ all along said his Estate was in his own Power. I told
 “ him I had acquainted Mr. *Vernon* what the Lady *Fur-*
 “ *nese* had said, and asked him if he told her so, and he
 “ said not. Mr. *Wright* replied, he often heard him
 “ say it. But I said the Estate is to be settled as I
 “ tell you, and I would have you meet Mr. *Vernon* at
 “ my Chambers, and see the Deed your self.”

About the Beginning of the Month following the
 Match between *Henry* and Mrs. *Wright* took Effect. Soon
 after that *Richard* sent a Letter to *Catharina*, lamenting
 the Match; but in the same Letter told her, “ I still ac-
 “ count it the greatest Happiness to the Family, that the
 “ Estate is settled.”

On the 14th of *June* 1718, another Account was
 stated between *Henry* and *Richard*, in the first *Item*
 whereof *Henry* was charged as Debtor to *Richard*, the 2d
 of *May* 1702, for the Principal Money then due on Bond
 3768 *l.* 11 *s.* 6 *d.* for the Interest thereof to the 21st of
August following 71 *l.* 6 *s.* 10 *d.* which, as was pretended,
 included the former Bond with which *Henry* was charged
 in the second Account in 3367 *l.* In another *Item* of that
 Account *Henry* was charged as Debtor to *Richard*, for the
 Balance of the last Account to the 25th of *June* 1708,
 146 *l.* 2 *d.* by which Means the 43 *l.* 9 *s.* 4 *d.* said to be
 due on *Richard's* Bill, for Business as an Attorney, was
 made to carry Interest.

In this Account at every Year's End, a Balance was
 struck, and that Balance was made to carry Interest. At
 the End of the ensuing Year a Balance was struck again,
 that Balance was made to carry Interest; and so from the
 End of every Year.

In another *Item* in this Account he was charged gene-
 rally with 1099 *l.* 8 *s.* 9 *d.* as due to *Richard* for Business
 done and Money disbursed. This was an *Item* charged in
 4 E March

March 1712. There was another *Item* of the like Kind for 1273 *l.* 6 *s.* 4 *d.* supposed to be due on the 12th of *January 1716.* There was another *Item* of the like Kind of 153 *l.* 18 *s.* 1 *d.* supposed to be due in *April 1718,* which three last mentioned *Items* amounted to 2526 *l.* 13 *s.* 2 *d.* and the Particular of these Bills did never appear to have been delivered.

Faithful swore this Account was stated at *Sudbury,* at the Time it bore Date, that the Vouchers were there at that Time. He swore that he could not depose whether the Account was examined by the Vouchers, but he believed the Vouchers were left at *Sudbury* after the Signing of it.

On the 18th of the same Month a Deed was made between *Henry* of the one Part, and *Thomas* and *Richard* of the other Part, whereby *Henry* did, by the Consent of *Richard,* convey to *Thomas* and *Richard* all his Estates in the Counties of *Derby* and *Stafford,* in Trust, that they and the Survivor of them, and the Heirs of the Survivor, as occasion should require, by Deed executed in the Presence of two or more Witnesses, should sell, charge, lease, mortgage, limit or appoint, all or any of the Premises, to any Person, for the raising any Sum of Money for the Purposes therein mentioned, namely, first for the Payment of all Bonds, &c. wherein *Richard* was bound for *Henry* as his Security, and for his proper Debts, and for the Discharge of all Sums of Money due from *Henry* to *Richard* for the Payment of the Annuities of 200 *l.* per Ann. and 50 *l.* per Ann. to the Wife of *Henry,* if she should survive him, and for the Payment of such Sums of Money for the Portion and Maintenance of *Anna-Cath.* his Daughter, as he by his Will or Deed should direct, and in Default of such Direction, for the Payment of 6000 *l.* for her Portion, and for such Maintenance till her Portion became payable, as *Thomas* and *Richard,* or the Survivor of them, or the Heirs of the Survivor should think fit; and also for such other yearly Payments for such Purposes as *Henry* should

should by Deed or Will direct, with the Consent of *Thomas* and *Richard*, as aforesaid.

In this Deed there was a *Proviso*, that the Debts owing from *Henry* to *Richard*, or for which *Richard* stood bound for *Henry*, should be paid in the first Place, and then that the other Debts owing from *Henry*, or his Father, should be paid in such Priority as *Thomas* and *Richard* should think fit; and after the Trust of this Deed discharged, that *Thomas* and *Richard* should convey the Premises to such Persons as *Henry* should by Deed or Will appoint, and in Default of such Appointment, that they should convey the same to *Henry* and his Heirs for ever.

By another Deed of the same Date, *Henry* did give to *Thomas*, *Richard* and *Anna-Catharina* his Aunt, the Guardianship of his Son and Daughter.

In the *February* following, *Henry* executed another Deed, whereby, with the Consent of *Thomas* and *Richard*, he charged his Estates with the Payment of 10000 *l.* to his Daughter, and settled his Estate to such Purposes as are therein mentioned. The Day following *Henry* made his Will, which was drawn by *Richard*, wherein he declared, that the Conveyances, which were before executed by *Henry* to *Richard*, were fair and just, and thereby made *Richard* and *Thomas* his Executors. At the End of that Month *Henry* died. *Thomas* and *Richard* proved his Will, and *Richard* enter'd into the Possession of his real Estate. In 1720 *George VENABLES VERNON* was an Infant, and in that same Year he brought his Bill by his *Prochein amy* against *Richard*, *Thomas* and others, to compel *Richard* to come to an Account. To that Bill *Thomas* put in his Answer, and thereby set forth the Deed, confirming the Articles, which he swore bore Date the 3d of *May* 1707. To the same Bill *Richard* put in his Answer; he thereby denied that the Articles were ever confirmed, and swore, that his
Writing

Writing *Henry* Word in those Letters, that the Articles were confirmed, and the other Steps that he took to make it be believed so, was only an Invention of his to keep *Henry* from his second Match. *Faithful*, who was Clerk to *Richard* swore, that he did believe this was an Invention of *Richard*'s, made use of for that Purpose.

In 1726 *Richard* made his Will, and thereby devised a great Part of his real Estate to *Crew* and *Applebee*, in Trust for the Payment of all his Debts, except such as he had contracted by being bound Surety for *Henry*. *Richard* died, and that Cause was never brought on to Hearing. After this *Anna-Catharina*, the Sister of *George Venables Vernon*, brought her Bill against him, in order to have the 10000*l.* which was given her by the Will of her Father, raised out of his real Estate. That Cause came on to Hearing on Bill and Answer, and a Decree was made for that Purpose accordingly. Afterwards *Thomas* died, leaving two Daughters *Annabella* and *Matilda*, who were his Heirs at Law.

The present Bill was brought by *George Venables Vernon* against *Jane* the Widow and Executrix of *Richard Vernon*, who had intermarried with *Thomas Vaudrey* her Husband, against *Crew* and *Applebee* the Devisees, in Trust under the Will of *Richard*, and against others, praying, amongst other Things, a Discovery of the Deed of May 1707, whereby the Articles made on the Marriage of *Henry* with *Anne* were supposed to be ratified; and praying that an Account might be taken of the Rents and Profits of the Estates of *Henry*, which *Richard* had received, that the Plaintiff's Estates might be discharged of all Incumbrances made upon them by *Henry* and *Richard*, contrary to the Marriage-Articles, or that the Plaintiff might have a reasonable Satisfaction for the same out of the Estates of *Richard* and *Thomas*. There was likewise a Cross Bill brought by *Thomas Vaudrey* and *Jane* his Wife, against *George Venables Vernon* and others, praying amongst
I other

other Things, that *Cholmondeley*, *Annabella* and *Matilda Vernon* might be compelled to sell the Estates comprised in the Deeds of the 6th of *June* 1707, and of the 18th of *June* 1718, and of the 12th of *February* in that same Year, and out of the Money arising from the same, that *Thomas Vaudrey* and *Jane* his Wife might be paid such Sums of Money as were due to them in the Right of *Richard Vernon*.

Lord Chancellor said his Opinion was, that the Plaintiff in the original Cause was intitled to Relief; he said, that this was a Cause of a very extraordinary Nature, that it had a great many Parts in it, and a Variety of Circumstances. The general Consideration under which the several Branches of the Cause fall are these; 1st, Whether *Henry Vernon* was bound by the Articles which were enter'd into upon his Marriage with *Anne Pigot*. That Question depends upon a subsequent one, Whether he confirmed those Articles, or not, after he attained his Age of twenty-one; the next Question is, supposing those Articles were confirmed by him, what will be the Consequence thereof, and what is the Relief which the Plaintiff in the original Cause is intitled to. This Relief is divided into two Parts; 1st, In Respect of those Demands of *Vaudrey* and his Wife, which they have originally upon the Plaintiff, as being Debts which *Henry* immediately contracted with *Richard*; and, 2dly, In Respect of such Incumbrances as *Richard* joined in with *Henry*, and were brought upon the Plaintiff's Estate, in Contradiction to the Articles. Another Question in this Cause relates to the several Accounts which *Henry* settled with *Richard*. Some of these are said to be stated Accounts, the others of them are such as are confessedly open ones. With regard to the stated Accounts, a Question has been made, whether they are to be opened at all. And if they are to be opened, another Question will be, whether they are to be set aside intirely, as being obtained by Fraud, or whether they are only to be opened in a more limited Manner, with Liberty to surcharge

Where a
Person shall
be said to
have con-
firmed
Marriage
Articles af-
ter he came
of Age.

and falsify; with regard to the other Questions in this Cause, so far as they concern Accounts to be taken, there will be a clear Direction as to them. For as to the *Kinderton* Estate, which *Richard* received the Profits of from the Death of the Countess of *Abington*, an open Account must be directed to be taken as to them. So as to the *Sudbury* Estate, an open Account must be directed to be taken of that likewise from the Death of the Plaintiff's Father. These are the several Questions which arise in these Causes, and it will be proper to consider each of them as standing in their Order. The first of these Questions is, Whether *Henry* was bound by the Articles entered into upon his Marriage with *Anne*; and that Question depends upon this, Whether *Henry* confirmed those Articles after he came of Age. With regard to this Part of the Case, his Lordship's Opinion was, That upon the Circumstances of this Case, and the Evidence which has been laid before the Court, it must be taken that *Henry* confirmed the Articles after he came of Age. The Articles themselves were in their Nature reasonable, and fit to be confirmed, considering the great Estate which *Henry* was like to have by the Means of this Lady. When he came of Age, *Richard* as Guardian to the Lady was bound to insist, that the Articles should be confirmed. In respect of the Lady the Terms were very moderate. She was to have only 100 *l.* per Ann. for Pin-money, till the *Kinderton* Estate should fall in, and then she was to have but 100 *l.* per Ann. more. The Time for the making the Settlement was suitable to the Circumstances of the Case. The *Kinderton* Estate was not to be settled till the Countess of *Abington* died, unless the Lady should think proper to join before in the making a Settlement. As to the *Sudbury* Estate, that depended upon the Wife's making a Settlement of her own Estate. On the 27th of April 1707, *Henry* came of Age. And according to a Covenant in the Articles, his Mother and Uncle were bound, within one Month after he came of Age, to see that he confirmed them. To consider then, whether, on the Evidence of the Fact, there is Reason to believe that

that the Articles were actually confirmed or not ; 'tis indeed true, that no such Deed appears by which the Articles were confirmed. But upon the Circumstances of the Case there is all the Evidence of their being confirmed, that can be expected in a Case of this Nature. There has been one Thing mentioned by the Counsel for the Defendants, which is to be laid out of the Case, and that is the Decree which was made upon the Bill brought by the Plaintiff's Sister against him ; for the Decree in that Cause cannot be Evidence in the present one. To consider then the Nature of the Evidence which has been given ; in 1714 the Lady of *Henry* died ; the Year following he was entering upon a Treaty of Marriage with a second Wife. *Richard* disapproved of that Match, and by various Letters, which *Richard* sent to him in that Year, he repeats it to him, that he confirmed the Articles. The first of those Letters was writ upon the 27th of *March* in that same Year ; he tells him in general, That a Marriage of this Sort will be very inconvenient to him ; and in the Postscript adds, " If you have any Doubt how
" far the Marrying her will be inconvenient to you, I will
" then enumerate the Particulars, whereby to demonstrate,
" that it will not be in the Power of all your Friends to
" save you from being pulled to Pieces and Undone, if
" you marry there, or indeed any where else at present ;
" and depend upon it, those who can entertain such
" Thoughts are not your Friends." After this he goes on with a Correspondence with him in several Letters, one after another. In the *April* following he tells him, " I beg
" you'll give me leave to be more particular. The Debts
" you are in are near 15000*l*. which would have made
" you very Uneasy before this Time, had the World
" known, especially those that lent you Money, that
" since your coming to Age you ratified the Settlement
" made at your Marriage, whereby you have no Power
" over the Estate ; this has been concealed not only from
" your Relations, but every Body else to this Day, that
" you might have it in your Power to make Things easy
" till the *Kinderton* Estate should fall into the Family, other-
" wise

“ wife the paternal Estate, which now lies all within a Ring,
“ and as it is together is the most noble and delightful,
“ would by this Time have been torn to Pieces, and you
“ made very uneasy. I believe those, who now are the
“ Promoters of this Match, did they know the Circum-
“ stances you are in, would be of another Opinion, than
“ to think of such a ridiculous Marriage for you.” In
the Postscript he says, “ Pray don’t mention at present
“ the Estate being settled.” By this Letter he confirms,
that the Estate is settled, and that the Articles are rati-
fied. The next Letter was sent upon the 2d of May fol-
lowing; he there gives him an Account of the *Kinderton*
Estate being fallen in. “ I insisted, says he, that
“ they, meaning *Cath.* and *Thomas*, should enter into Co-
“ venants and Bonds previous to the Marriage, that you,
“ at your coming to Age, should settle your own Estate to
“ the Uses, and upon the Terms agreed upon; and such
“ was their Regard for you, that they rather chose, and
“ readily came into these Obligations, than lose the Op-
“ portunity of so great a Fortune to you and your Fa-
“ mily. Upon these Terms I consented, and the Mar-
“ riage took Effect; and therefore at your coming to Age
“ in May 1707, in pursuance of my Trust, I required
“ your Assent to, and Confirmation of the Marriage Arti-
“ cles, which you very justly complied with. And I now
“ send you the inclosed Copy of the Deed that you exe-
“ cuted for that Purpose, whereby you’ll find, that you
“ are only Tenant for Life of your whole Estate, with
“ Remainder to your Son, the Issue of that Marriage.
“ But after this was done, your Debts, which are great,
“ pressing you very much, I rather chose to keep these
“ Things dormant, that you might borrow Money upon
“ the Estate, than to suffer you to be exposed in the
“ World, not doubting but that in due Time this Estate of
“ *Kinderton* would fall in to extricate you out of these
“ Difficulties, and now we have seen the happy Day. But
“ I would have your Son and the World kept in the Dark
“ as to the Settlement of the Estate.” By this Letter he
tells

tells him that he had, in pursuance of the Articles, required a Confirmation of them, and that *Henry* had justly complied with it; and tells him farther, "I now send you the inclosed Copy of the Deed that you executed for that Purpose, whereby you'll find, that you are only Tenant for Life of the whole Estate, with Remainder to your Son, the Issue of that Marriage." This is a positive and direct Affirmation of the Fact. As this is the principal and strongest Letter that was writ, consider the Objections that have been made to the Conclusion arising from it. It has been said, that all this was a Fiction; and that it was invented for the Purpose of breaking off the second Match. But if this was the Design, it is very surprising, that *Richard* should assert a Fact to *Henry* which it was in the Power of *Henry* directly to contradict him in. Another Letter was writ by *Richard* on the 28th of the same Month, and that Letter was sent to the Sister of *Henry*. He there says, "I received your Letter by your Maid on *Wednesday* last. That Day I got Mr. *Vernon's* Opinion upon the Marriage Articles, a Copy whereof I here send you, that the Estate is secured, and that he can make no Settlement upon another Wife. Mr. *Vernon* advised farther, That we should give Mrs. *Wright* a Copy of it, which her Uncle did the next *Monday* in Presence of the Lady *Furnese*; he read the Case and Opinion, and explained the Whole to them. My Lady *Furnese* affirmed he always assured her, that his Estate was in his own Power; but since it was not she would have nothing to do in it. The next Day I saw Mr. *Wright* himself, and asked him, If he had seen Mr. *Vernon's* Opinion? He told me he had, and that he was surprised at it, because Mr. *Vernon* had all along said his Estate was in his own Power. I told him I had acquainted Mr. *Vernon* what the Lady *Furnese* had said, and asked him, If he told her so? And he said not. Mr. *Wright* replied, he often heard him say it. But I said, the Estate is to be settled as I tell you, and I would have you

Whereas Person telling another that he had confirmed his Marriage Articles shall not be taken to be a Fiction.

“ meet Mr. *Vernon* at my Chambers and see the Deed
 “ your self —

When an Indorsement is made on a Deed, declaring that a Person would not confirm Marriage Articles which he had enter'd into, how far that Argument shall not be conclusive to shew that he did not confirm them.

By this Letter it appears, That the Opinion of Counsel was taken, and that a Meeting was appointed to see the Deed. But then in Opposition to these Letters it has been said, that on the 5th of *June* 1707 there is an Indorsement made on the Back of the Articles, importing a Declaration that *Henry* would not confirm them. This Declaration is introduced with a very extraordinary Recital. It is in this Manner; “ Whereas the within named *Henry Vernon*, “ *Anne* his now Wife, formerly *Anne Pigot*, *Cath. Vernon*, *Tho. Vernon* and *Richard Vernon*, have well considered, and “ found, before such Time as *Henry Vernon* attained his “ Age of Twenty-one Years, that the Articles of Agreement Quadripartite indented, made between *Henry Vernon*, *Anne* his Wife, by the Name of *Anne Pigot*, “ *Cath. Vernon*, *Thomas Vernon* and *Richard Vernon*, and “ bearing Date the 20th Day of *May* which was in the “ Year of our Lord 1703, contained in four Skins of “ Parchment, upon and before the Marriage of the said “ *Henry Vernon* with the said *Anne Pigot*, cannot be performed, as to the greatest Part of them, by the said *Henry Vernon*, the Debts and Legacies of his late Father *George Vernon*, Esq; deceased, amounting to much more than “ the said Parties to the said Articles till of late apprehended.” And then the Indorsement goes on, “ now “ therefore the said *Henry Vernon*, with the Privity “ of the said *Cath. Vernon*, *Thomas Vernon*, the said “ *Anne* and *Richard Vernon*, testified by their Signing and “ Sealing of these Presents, hath declared and expressed, “ and hereby doth declare and express, that he cannot perform the aforementioned Articles for the Reason aforementioned, nor doth he mean to endeavour at so impracticable a Thing as at present the Performance thereof doth appear to be; and therefore he the said *Henry Vernon* doth for himself and his Heirs declare, that he “ will

“ will not hold the within mentioned Manors and Heredi-
 “ taments in any Manner liable to the said Articles, or
 “ any of the Agreements therein contained or intended,
 “ nor will do any Thing in pursuance of the same. In
 “ Witness whereof the said *Henry Vernon, Cath. Vernon,*
 “ *Tho. Vernon,* the said *Anne* and *Richard Vernon* have here-
 “ unto set their Hands and Seals this 5th Day of *June* in the
 “ Year of our Lord 1707. *Henry Vernon.*” To this Deed
 here were the Seals of the Wife, the Mother, Uncle and
Richard, put for Form sake. But it does not appear that
 they ever executed it, so that it must be taken that they
 were not privy to it. If this is so, the Recital was in it self
 a false one. And it is in it self a strange Thing, that they
 should be privy to such an Indorsement, for the being so
 would be a direct Breach of the Covenants which they had
 ingaged in. And besides, there are suspicious Circumstan-
 ces attending the Indorsement it self. Upon these Grounds
 his Lordship’s Opinion was, That the Articles must be taken
 to have been confirmed. The next Question is, What will
 be the Effect of such Confirmation? and, What is the Re-
 lief which the Plaintiff will be intitled to in Consequence
 of it? That will depend upon the Consideration of the se-
 veral Acts that have been done by the Parties. The first
 of those is the Deed of the 6th of *June* 1707. It is in it
 self a most extraordinary Deed, plainly calculated to put
Henry’s Estate under the Management and Power of
Richard. That was a Deed made between *Henry Ver-*
non of the one Part, and *Cholmondeley* and *Richard Vernon*
 of the other Part, “whereby *Henry Vernon* covenanted with
 “ *Richard Vernon* only, and his Heirs, to levy several Fines
 “ with Proclamations, of all his Manors, Lands and Heredi-
 “ taments in the Counties of *Derby* and *Stafford*, and decla-
 “ red the Uses thereof to be to the Use of *Henry Vernon,*
 “ *Richard Vernon,* and *Cholmondeley*, their Heirs and Assigns,
 “ in Trust that they or the Survivor of them, or the Heirs of
 “ such Survivor, should or might by any Writing under
 “ their Hands sell, charge, lease, mortgage, limit or appoint
 “ all or any of the Premises in Possession, Reversion or Re-
 “ mainder

“ mainder to any Person, or for any Estate, or in any other
 “ Ways, or any other Manner whatsoever, in order for Rai-
 “ sing or Charging any Sum which should be needful on any
 “ Occasion relating to the Debts and Legacies of *George Ver-*
 “ *non*, or unto the Debts of *Henry Vernon*, which he then or
 “ should hereafter owe, and till the same Sale, Charge,
 “ Mortgage, &c. should be made, and so long as *Henry*
 “ *Vernon* should fail in paying any Sum or Sums, Mortgage
 “ or Bond, as he should enter into for Payment of Monies,
 “ and *Cholmondeley* and *Richard*, or either of them, should
 “ think fitting, to take the Rents and Profits of the Premises,
 “ in Trust to permit *Henry Vernon* to receive the Rents and
 “ Profits during his Life; and upon farther Trust, that *Henry*
 “ *Vernon* by any Deed sealed and delivered in the Presence of
 “ Two or more Witnesses, with Consent in Writing by *Chol-*
 “ *mondeley* and *Richard Vernon*, or of *Richard Vernon*, or the
 “ Survivor of them, to be sealed and delivered by them the
 “ said *Cholmondely* and *Richard Vernon*, or the Survivor of
 “ them, in Presence of Two or more Witnesses, might from
 “ Time to Time, subject unto such Sales, Charges, &c. as
 “ should be before that Time made as aforesaid, settle and
 “ assure the Premises to such Persons, Uses and Estates, as
 “ *Henry Vernon*, with such Consent as aforesaid, should think
 “ fit, and in Default thereof, to the Use of *Henry Vernon*, his
 “ Heirs and Assigns for ever.”

By this Deed *Cholmondeley* and *Richard* were made Jointe-
 nants, and yet it appears that *Cholmondeley* never heard
 that there was such a Deed. From the Nature of the
 Trusts of it, they are in themselves very extraordinary.
 By this Deed *Richard* in Effect takes *Henry* into Custody
 as effectually as if a Commission of Lunacy had been
 granted against him. As soon as this Deed was got, then
 it is that *Richard* goes to work, he engages *Henry* in
 several Securities. And then on the 18th of *June* 1718,
 here is a Deed made between *Henry* of the one Part, and
Thomas and *Richard* of the other Part, “ whereby *Henry* did
 “ by

“ by the Consent of *Richard*, convey to *Thomas* and *Richard*
“ all his Estates in the Counties of *Derby* and *Stafford*, in
“ Trust that they and the Survivor of them, and the Heirs
“ of the Survivor of them, as occasion should require, by
“ Deed executed in the Presence of Two or more Witnesses,
“ should sell, charge, lease, mortgage, limit or appoint, all
“ or any of the Premises, to any Person for the raising any
“ Sum of Money for the Purposes therein mentioned,
“ namely, for the Payment of all Bonds wherein *Richard*
“ was bound for *Henry*, as his Surety, and for his proper
“ Debts, and for the Discharge of all Sums of Money due
“ from *Henry* to *Richard*, for the Payment of the Annuities
“ of 200 *l.* per Ann. and 50 *l.* per Ann. to the Wife of *Hen-*
“ *ry*, if she should survive him; and for the Payment of
“ such Sums of Money for the Portion and Maintenance of
“ *Anna-Catharina*, his Daughter, as he by his Will or Deed
“ should direct; and in Default of such Direction for the
“ Payment of 6000 *l.* for her Portion, and for such
“ Maintenance till her Portion should become payable as
“ *Thomas* and *Richard*, or the Survivor of them, or the
“ Heirs of the Survivor should think fit; and also for
“ such other yearly Payments, for such Purposes as
“ *Henry* should by Deed or Will direct, with the Con-
“ sent of *Thomas* and *Richard*, as aforesaid.” By this Deed
it appears, that the *Proviso* was that the Debts owing
from *Henry* to *Richard*, and for which *Richard* stood bound
to *Henry*, should be paid in the first Place, and then
that the other Debts owing from *Henry*, or his Father,
should be paid in such Priority as *Thomas* and *Richard*
should think fit; and after the Trusts of this Deed dis-
charged, that *Thomas* and *Richard* should convey the Pre-
misses to such Persons as *Henry* should by Deed or Will
appoint; and in Default of such Appointment, that they
should convey the same to *Henry* and his Heirs for ever.
By another Deed of the same Date *Henry* did give to
Thomas, *Richard* and *Anna-Catharina* his Aunt, the Guardian-
ship of his Son and Daughter. This was a Deed granting a

Guardianship in the Life of a Parent, and could be made for no other Purpose, but that *Richard* might continue the Power over the Estate as long as he could. After this here is another Deed made on the 12th of *February* following, whereby with the Consent of *Thomas* and *Richard*, he charged his Estates with the Payment of 10000*l.* to his Daughter, and settled his Estate to such Purposes as are therein mentioned. The Day following *Henry* made his Will, which was drawn by *Richard*, wherein he appointed *Richard* and *Thomas* his Executors. The Recital in this Will is, that the former Deeds were just and fair, a very unusual one, and casts a Suspicion that they were not so. These Deeds and Instruments were all prepar'd by *Richard*, and he appears to have acted, as *Tully* says upon a like Occasion, *Malitiosis blanditiis Officiorum*. As these are the Acts that have been done, the next Consideration will be, what will be the Effect of them, and what is the Relief which the Plaintiff is intitled to. That will be divided into two Considerations; the first of them relates to the Incumbrances which have been brought upon these Estates by *Richard's* joining with *Henry*; and, 2dly, With regard to those Demands of *Vaudrey* and his Wife, which they have originally upon the Plaintiff, as being Debts which *Henry* immediately contracted with *Richard*. The Words of the Articles are, " That the Lands should be settled in Trustees for 100 Years; and as for and concerning the Term of 100 Years so to be limited to the said Trustees, as aforesaid, it is on the special Trust, that the said Trustees, and the Survivor of them, their Executors, Administrators and Assigns, shall by and out of the Rents and Profits, or by Sale, Demise or Mortgage of all or any Part of the Premises, whereof the said Term is so to be limited, for all or any Part of the said Term, as they in their Discretions shall think fit, in the first Place raise and levy any Sum or Sums of Money, not exceeding in the Whole the Sum of 5000*l.* of lawful English Money

“ Money, to satisfy and discharge, and to indemnify the said
 “ *Catharina Vernon* and *Thomas Vernon*, and either of them,
 “ their and either of their Heirs, Executors and Admini-
 “ strators, of and from all such Sum and Sums of Money, as
 “ they or either of them have undertaken, or shall or do
 “ undertake by these Presents, or otherwise, to pay for or
 “ upon the Account of the said *Henry Vernon*, or where-
 “ with any Part of his Estate stands charged or incumbered,
 “ and afterwards for the Payment of such other Sum and
 “ Sums of Money which the said *Henry Vernon* shall owe
 “ at the Time of his Death, so as all such other Debts
 “ and Engagements and Sums of Money in the Whole
 “ exceed not the farther Sum of 5000*l.*” But what
 Debts will be proper to be raised out of this Term will be
 a Matter for an Inquiry before the Master. And when he
 has made his Report, the Question will come properly for
 the Opinion of the Court. The next Question is, how
 far the Estate will be intitled to be disincumbered of those
 Securities which have been brought upon the Estate, and
 which *Richard* joined in with *Henry* as Surety for him. It
 has been insisted on the Part of the Plaintiff, that *Richard*
 is to be considered meerly as a Trustee for *Henry*; and
 that as far as he has joined in those Securities to Persons
 having no Notice of the Articles, the Plaintiff will be inti-
 tled to have a Satisfaction against *Richard*. His Lordship’s
 Opinion was, that in general the Plaintiff is intitled to
 such Satisfaction. The Question will be, out of what
 Fund he will be so intitled. Thus much must be admit-
 ted to be established by various Decrees of this Court, that
 if an Estate is settled in the Hands of Trustees, and they
 convey it over to another for a valuable Consideration,
 who has no Notice of the Trust, the Trustees shall make
 Satisfaction to the *Cestuy que Trust*. The Question then is,
 whether from the Facts that have been proved in this
 Cause, *Richard* is within that Rule. As the Matter rested
 barely on the Articles, *Richard* could not strictly be said to

If an Estate
 is settled in
 the Hands of
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 Considera-
 tion, who has
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 que Trust*.

Who shall not be said to be such a Trustee for another, as to be answerable in Case he sells the Estate.

be within that Rule, because he was not a Trustee for the Plaintiff, but a Party contracting on the Part of the Lady; no Estate vested in him, nor was he otherwise concerned in those Articles than as Guardian to the Lady. But then consider the subsequent Facts that have happened, and he will be brought within that Rule. For by the Deed of the 6th of June 1707 Henry conveyed his Estates to *Cholmondeley* and *Richard* in Jointenancy, and thereby he became a Trustee. From the Time that Deed was made, and the Fine levied in Pursuance of it, *Richard* was seised in Jointenancy, with Notice of the Trust contained in the Articles. Notwithstanding this, he afterwards joined with *Henry* in charging this Estate to Persons for a valuable Consideration, who had no Notice of the Articles; the Consequence is, that he will be liable to make Satisfaction to the Plaintiff. But as he only joined in these Incumbrances as Surety for *Henry*, *Henry's* Estate will be liable in the first Place, and *Richard's* only in Default of *Henry*. The next Question is, what Part of *Richard's* Estate will be liable to make this Satisfaction. As to that it cannot be doubted, but that his personal Estate will be liable to make it. The Question will be, how far the Plaintiff will be intitled to come upon the real Estate of *Richard*. It is very true, that *Richard* has devised a great Part of his real Estate in Trust for the Payment of all his Debts, except such as he had contracted by being bound as Surety for *Henry*. And if this had been a Devise for the Payment of all his Debts generally, undoubtedly this would have been good within the *Proviso* of the Statute of *Fraudulent Devises*. But as this Devise was not for the Payment of all his Debts generally, this Case is not within the Benefit of that *Proviso*. The Consequence is, that the Plaintiff, tho' he is only to be considered a Simple Contract Creditor, will be intitled to stand in the Place of the Specialty Creditors, as far as they exhaust the personal Assets of *Richard*. Another Question proper to be considered, relates to the Accounts which must be

Where one Person shall only be liable in Default of another.

How far a Devise for the Payment of Part of a Man's Debts is not within the Benefit of the *Proviso* in the Statute of *Fraudulent Devises*.

How far a Creditor by Simple Contract shall be allowed to stand in the Place of the Specialty Creditors, as far as those Creditors exhaust the personal Assets.

be directed to be taken in the present Case. With regard to the *Kinderton* Estate that Account is open, and *Vaudrey* and his Wife must account for the Profits of that Estate from the Death of the Countess of *Abington*. They must likewise account for the Profits of the *Sudbury* Estate from the Death of *Henry*. With regard to the stated Accounts Two of them were settled in *May* 1707. and there is no Ground to open those Accounts. With regard to the Account in 1718, 'tis certain it must not be allowed to stand; and if *Richard* and *Henry* were both living, nothing would be clearer than that that Account would be set aside in the Whole of it, and an open Account directed. Where there are only Mistakes in an Account, that is a Reason indeed, even whilst both Parties are living, only to give Liberty to surcharge and falsify, but where there are gross Impositions in the Account, as there are in the present Case, that is a Reason whilst the Parties are living to set aside the Account intirely. The Party indeed, in whose Favour the Account is settled, may suffer by that Means, but if he does, he suffers for his own Fraud. The Doubt in the present Case is, whether the like Directions should be given, as *Richard* is dead, and considering the Length of Time since which this Account is settled. As to the Length of Time it is a Circumstance of no great Weight in the present Case; for though it is above Twenty Years ago, yet a Bill was brought much to the same Effect with the present one a few Years after, and the present Bill was brought in 1732. The Question then is, Whether any Difference shall be made from the Circumstance of *Richard's* being dead? And in the present Case there ought not. The Account was fraudulently obtained, and a Representative ought not to profit by such a Behaviour. This was an Account that was made up just before *Henry's* Death. The Account does not appear to have been examined by the Vouchers. It appears that *Henry* was a Man extremely negligent in his Affairs, and that he placed an absolute Confidence in *Richard*. The Account in the very Nature of it is such as

Where an Account settled with a Person after he comes of Age shall not be opened.

Where there are only Mistakes in an Account, that is a Reason indeed, even whilst both Parties are living, only to give Liberty to surcharge and falsify; but where there are gross Impositions in the Account, that is a Reason whilst the Parties are living to set aside the Account intirely.

Where an Account shall be set aside intirely, notwithstanding the Length of Time since the Account was stated.

Where an Account shall be set aside intirely, notwithstanding that both the Parties

4 I

ties who signed the Account are dead.

is fit to be opened. Interest is carried into Principal; and his Lordship mentioned other Impositions in it. This was the Substance of the Argument which his Lordship made use of at the Hearing of this Cause; but the Form of his Decree he did not pronounce till a few Days after. Just before the Pronouncing of it he said, that he had considered of this Cause again, and that he had found Reason to alter his Mind in some Particulars; one of them related to the Account which was settled in 1718, and upon a more minute Observation he had found, that some of the Items of it contained gross Sums for Monies advanced by *Richard* to *Henry* upon Securities. And there were several Sums of Money, amounting not indeed to much for Goods bought by *Richard* for *Henry*. With regard to both these several Kinds of Items in the Account, his Lordship said he thought it would be hard to set aside the Account, and to put the Representative of *Richard* to make strict Proof in relation to those Items; for which Reason he would direct, that those Items should stand without farther Proof of them, but with Liberty for the Plaintiff to falsify them. Another of these Matters is in relation to what Sums *Henry* had a Power to charge his Estate with under the Articles; and upon reading the Articles his Lordship was of Opinion, that the Estate was liable to be charged with three 5000 *l*. He said he did not mean that the Estate would be so charged certainly, and at all Events, but that there were three such several Sums which might be a Charge upon it; for, First, The Estate was subject to 5000 *l*. which were the Debts of *George*. Then, when the Trust of the Term comes to be declared, it is in this Manner; "in Trust that the Trustees
 " shall in the first Place raise and levy any Sum or Sums of
 " Money not exceeding in the Whole the Sum of 5000 *l*. of
 " lawful *English* Money to satisfy and discharge, and to in-
 " demnify the said *Cath. Vernon* and *Richard Vernon*, and
 " either of them, their, or either of their Heirs, Executors
 " and Administrators, of and from all such Sum and Sums
 " of Money, as they or either of them have undertaken, or
 " shall or do undertake by these Presents, or otherwise, to

" pay

When an Account is ordered to be set aside entirely, where a Direction shall be given that certain gross Sums advanced upon Securities shall be excepted, but even as to them Liberty given to falsify.

When an Account is ordered to be set aside entirely, where a Direction shall be given that certain Items in the Account relating to Goods bought for the Party shall be excepted; but even as to them Liberty given to falsify.

How many different Sums a Person shall be said to have a Power to charge an Estate with.

“ pay for or upon the Account of the said *Henry Vernon*. ”
Had the Clause stopped there, there would have been no Colour to say, that the Trustees could have raised any such Sum as 5000 *l.* at all, because *Cath.* and *Thomas* had in no Way undertaken to pay any such Sum. But then come the Words which create the Doubt, namely, *or wherewith any Part of this Estate stands charg'd or incumber'd.* And under these Words the Trustees will be impower'd to raise a second 5000 *l.* upon the Estate, besides the 5000 *l.* which the Estate was agreed by the Articles to be charg'd with on the Account of the Debts of *George*. And there is clearly a third 5000 *l.* which the Estate is charg'd with, arising from these Words; “ and afterwards for the Payment “ of all such other Sum and Sums of Money which the said “ *Henry Vernon* shall owe at the Time of his Death, so as “ all such other Debts and Engagements, and Sums of Money, in the Whole exceed not the farther Sum of 5000 *l.* ” His Lordship said, that the Consequence of this is, that he must declare, that the Estate is chargeable with three 5000 *l.* But he would declare this without Prejudice to the Plaintiff, because, as he had before observed, he should direct the Master to inquire what Sums of Money the Estate was liable to, according to the Provision in the Articles. The remaining Question, which his Lordship said he had again considered of, related to the Statute of Fraudulent Devises. And he had a Doubt, whether the Opinion which he had before given was right or not; however, he said he would reserve that Question likewise to be determined on the Master's Report. And so his Lordship was pleased to decree accordingly.

Villiers and Villiers.

November 15.

J. C. 2. Mich. 71. J. C. 2. Mich. 71. J. C. 2. Mich. 71. J. C. 2. Mich. 71.
BY Letters Patent of the 13th of *June* in the 17th of *Car. 2.* a Grant was made to Sir *Edw. Villiers* of the Custody of a Light-House in *Northumberland*, to hold to him and his Heirs for ever. And by other Letters Patent dated

dated the 20th of *June* in the 26 of *Car. 2.* a Grant was made to the same Person of a Piece of Ground adjoining to the Light-House, to hold for the Term of Ninety-nine Years.

On the 8th of *May* 1685 Sir *Edward* made his Will, and thereby gave to his Son *Henry Villiers*, and to his Assigns, all his Estate and Interest in the said Light-house, Messuage, Lands and Tenements, and Appurtenances thereunto belonging, situate and being in or near *Tinmouth*, upon Trust and Confidence that the said *Henry Villiers* should, during the Remainder of the Term of Ninety-nine Years, which he had then to come in the said Estate, out of the Rents and Profits thereof, pay unto Sir *Edward Villiers*, eldest Son of the said Testator, and his Assigns, 200 *l.* a Year; and of such Will he appointed *Henry Villiers*, the Defendant's late Father, Executor.

On the 28th of *October* 1685, in pursuance of an Agreement before the Marriage of the Plaintiffs Father and Mother, Sir *Edward Villiers* demised all the Premises to *Henry Villiers*, his Executors, Administrators and Assigns, for Sixty Years, at the yearly Rent of 200 *l.* and, as the Plaintiffs contended, by Indenture dated on or about the 5th of *Nov.* 1685. made between *Henry Villiers* of the one Part, and *Alexander Mackenzie*, Father of *Anne* the Plaintiffs Mother, and *Murdock Mackenzie*, of the other Part, reciting, amongst other Things, the Agreement before the Marriage of *Henry Villiers*, for the Consideration therein mentioned, assigned all the Premises with the Appurtenances, and all his Right and Title thereto, for the Term of Sixty Years, under the yearly Rent of 200 *l.* to *Alexander* and *Murdock Mackenzie*, their Executors, Administrators and Assigns, in Trust for the several Uses therein after mentioned, *viz.* To the Use of *Henry* and his Assigns for Life; and after his Decease to the Use of *Anne* for her Life, if she should survive her Husband; and after the Death of *Henry* and *Anne* to the Use and Behoof of the Children of the

the said Marriage, with Remainder to the Use and Behoof of *Henry Villiers*, his Executors, Administrators and Assigns. And he thereby covenanted to warrant the Premises to *Alexander* and *Murdock Mackenzie*, their Executors, Administrators and Assigns, to those Uses, against all Persons whatsoever. But whether there really was ever such a Deed or not did not plainly appear. In 1690 Sir *Edw. Villiers* died.

On the 25th of *August* in the 7th of *Will.* and *Mary* another Deed was made, whereby it was witnessed, “ That
“ *Henry Villiers* assigned to Trustees the Remainder of the
“ Term of Ninety-nine Years, in the Messuage and Land
“ adjoining to the Light-House, to the Use of *Henry Villiers* for his Life, the Remainder to the Use of *Anne* his
“ Wife for her Life, the Remainder to the Use of the
“ Heirs of their Bodies, the Remainder to the Use of the
“ right Heirs of *Henry* during the Remainder of the Term.”

On the 6th of *May* 1697 the Defendant insisted, that another Deed was made by *Henry Villiers*, “ whereby he
“ granted the Light-House, together with the Lands adjoining to it, to Trustees, in Trust for the Raising 100*l.*
“ to be paid to such Persons as *Henry Villiers* should appoint; and after the Death of *Henry Villiers* the yearly
“ Sum of 80*l.* to *Anne* his Wife, in case she should survive him; and then to pay all and each of the Children of
“ *Henry*, on *Anne* begotten, (except the Plaintiff) the yearly Sum of 40*l.* during their respective Lives; and after such Payment to permit the eldest Son of *Henry* by
“ the said *Anne* to receive the Rest and Residue of the
“ Rents and Profits to his own Use.” But whether this Deed was made or not did not fully appear.

Henry Villiers died, leaving *Anne* his Executrix. Afterwards she died, and appointed *Henry* her Son her Executor.

The present Bill was brought by *Barbara Villiers* the Daughter, who was excluded by the Deed of 1697, if

any such Deed there was, against *Henry Villiers* the Son, and the Rest of the Children of *Henry* the Father, praying to have an Account of the personal Estate of *Henry* the Father.

Lord Chancellor said, That there were two Questions proper for his Consideration; in the first Place, Whether any Part of the Premises was to be considered as the personal Estate of *Henry*. And, Secondly, If any Part of the Premises was to be so considered, how the same has been settled, and which of the Parties are intitled to it. The first of these Questions depends upon the Grants of King *Charles II.* and the Acts done subsequent to them. By the first of those Letters-Patents a Grant was made to *Sir Ed. Villiers* of the Custody of the Light-house, and by that Grant he undoubtedly had a Fee-simple. By the second of those Letters-Patents, a Grant was made of a Messuage and Piece of Land adjoining to the Light-house; but that Grant was made for a Term of ninety-nine Years only. If the Matter had stood thus, there can be no Doubt but the Light-house must have been considered as the Estate of Inheritance of *Sir Ed.* and the other Part of the Premises must have been considered as his personal Estate. The next Matter proper to be considered is, what arises from the Acts done by *Sir Edward* subsequent to those Grants. On the 8th of May 1685, he made his Will, and thereby gave to his Son *Henry Villiers*, and to his Assigns, all his Estate and Interest in the Light-house, Messuages, Lands and Tenements, and Appurtenances thereunto belonging, situated and being in or near *Tinmouth*, upon Trust and Consideration, that *Henry Villiers* should, during the Remainder of the Term of ninety-nine Years, which he had then to come in the Estate out of the Rents and Profits thereof, pay unto *Edward Villiers*, eldest Son of the Testator, and his Assigns 200 *l.* a Year, and 40 *l.* per Ann. to Dame *Martha*, the Wife of the Testator, and of such Will appointed *Henry Villiers* Executor. At the Time of making his Will *Sir Ed-*
ward

ward had two Sons, *Edward* his eldest Son, and *Henry* his youngest. It has been insisted, that by this Devise *Henry* took only a Term of ninety-nine Years in the Light-house itself, any more than he did in the Messuage and Land adjoining to it. But his Lordship said his Opinion was, That by the legal Construction of this Will *Henry* took a Fee-simple in such Part of the Premises wherein the Testator had a Fee-simple, and a Term for ninety-nine Years in such Part of the Premises wherein the Testator only had such Term. The plain Intention of the Testator was to devise his whole Interest that he had in the Premises. And there are sufficient Words to pass a Fee-simple Estate in such Part of the Premises wherein he had a Fee-simple. The Case of *Whitchurch* and *Whitchurch* in 2 Will. Rep. has indeed been cited to the contrary. But that Case does by no means come up to the present one. It has been said however, that the Deed of the 28th of *October* 1685, amounts to a Revocation of that Part of the Will whereby the Term of ninety-nine Years was devised to *Henry*. But there is no Ground to say, that that Deed should amount to such a Revocation. The Deed is made in Affirmance of the Will, and to carry the Intent of it farther into Execution. And as to the Case in 2 Cro. 49. it does not come up to the present one. It has been said by the Counsel for the Plaintiff, that under the Deed of the 7th of Will. & Mar. the whole Remainder of the Term became vested in *Anne* the Mother, and in Consequence the Plaintiff, as one of her Children, is intitled to a distributary Share in it. But his Lordship's Opinion was, that the whole Remainder of the Term did not become vested in *Anne* the Mother. To shew that it does, the Case of *Peacock* and *Spooner* has been cited. But that Case differs from the present one. And besides his Lordship said, That he had seen the Minutes

A. has a Fee-simple in a Light-house, and a Term for Years in Land adjoining to it. He makes his Will and thereby gives to his Son *Henry* and to his Assigns all his Estate and Interest in the Light-house, Lands and Tenements, and Appurtenances thereunto belonging, upon Trust, that he pay out of the Rents and Profits of the Term, during the Remainder thereof, 200 l. per Ann. *Henry* takes a Fee-simple in such Part of the Premises wherein the Testator had a Fee-simple, and a Term for ninety-nine Years in such Part of the Premises

wherein the Testator only had such Term.

Where a Deed shall not be said to revoke a Will, but on the contrary to carry the Intent of that Will farther into Execution.

A. assigns a Term in Trust for himself for Life, the Remainder for his Wife for Life, the Remainder to the Heirs of their Bodies, the Remainder to the Heirs of *A.* during the Remainder of the Term; the whole Remainder of the Term does not become vested in the Wife.

minutes of that Case taken in the House of Lords; and it thereby appears, that the Judges were greatly divided in Opinion; and in the same Report there is the Case of *Web* and *Web* expressly in Point, to shew that the whole Remainder of the Term does not vest in the Mother. There are other Questions in the present Cause arising upon the Deeds of the 5th of *November* 1685, and the 6th of *May* 1697; but as it is doubtful, whether there were such Deeds, or not, his Lordship said he would not determine those Questions at present, but would direct an Issue to try the Validity of those Deeds. And so his Lordship was pleased to decree accordingly.

Novemb. 21.

Gainsborough and Stork.

IN 1733 *Thomas Gainsborough* and *Samuel Stork* entered into Articles of Copartnership for trading together as Merchants to *New England*. The Stock which they agreed to have upon entering into the Partnership was 1500 *l.* 1000 *l.* Part thereof was put in by *Stork*, and the remaining 500 *l.* was put in by *Gainsborough*; by those Articles it was agreed, that Accounts should be regularly made up between them at *Christmas* every Year; and if any Error should be made in the Accounts, it should be taken Advantage of during the Life-time of both of the Parties, or otherwise should not be taken Advantage of at all. Then followed a Clause to this Effect, "That if either of the Parties
 " should die during the fourteen Years intended for the
 " Partnership, and after an Account passed between them,
 " then the surviving Partner should take to his own Use
 " all the Goods, Ready Money, and Things which on
 " the last casting up before such Death should happen to
 " be in Stock between them, and should pay or satisfy to
 " the Executors or Administrators of the deceased Partner
 " so much Money, as the Share of such deceased Partner
 " amounted to at the Time of such last Account made;
 " and the surviving Partner should satisfy and pay to the
 " Executors

“ Executors or Administrators of the deceased Partner
“ the Share of such Stock in the Manner following, *viz.*
“ One third Part thereof at the End of twelve Months
“ next ensuing such Death, one other Third at the End
“ of eighteen Months, and the remaining Third at the
“ End of twenty-four Months next after such Death, with
“ Interest for each Third at 5 *l. per Cent.* from such Death
“ till the several Times of Payment; that for securing the
“ several Payments, the surviving Partner should within
“ twenty Days next after such Death become bound in a
“ Bond to the Executors or Administrators of the deceased
“ Partner, for Payment of the same accordingly; on the
“ executing of which Bond, the Executors or Administra-
“ tors of the deceased Partner were to release to the survi-
“ ving Partner all their Right and Title to their Share in
“ this Stock.”

At *Christmas* 1734, the Partners stated and signed their Accounts according to the Direction of the Articles. But in *June* 1735, they made an Indorsement on the Articles to the following Effect. “ The Clause in the Articles
“ which was last mentioned was in the first Place recited,
“ it was recited likewise, that in Case of the Death of
“ either of the Parties there would be in all Probability
“ Debts outstanding due to the Partnership at *New Eng-*
“ *land*, and other Parts beyond Seas, for Goods and Mer-
“ chandize consigned by the Copartners to their Corre-
“ spondents in those Parts to a considerable Value, and
“ that by Reason of such Debts proving bad, and the Va-
“ riation of the Exchange in *New England* and other Parts,
“ the surviving Partner may be much damaged by ac-
“ cepting such Debts, according to the making up of such
“ last Account on the Foot of the Articles; therefore for
“ preventing such Loss to the surviving Partner, in Case
“ of the Death of either of the Parties before the End of
“ the Copartnership, it was agreed between them, that in
“ Case either of them should die before the Expiration of

“ the Partnership, that the surviving Partner should not
“ be accountable or liable to pay the Executors of the de-
“ ceased Partner for any outstanding Debts in *New Eng-*
“ *land*, or any other Parts beyond Sea, which at such
“ Death were due to the joint Trade by the Partners Con-
“ signment of their Effects to their Correspondents at *New*
“ *England*, or other Parts abroad, on their own Account,
“ otherwise than as the same Effects shall from Time to
“ Time be gotten in and received by the surviving Part-
“ ner, and then only for the Share thereof of the Partner
“ so dying.” In the *Christmas* following the Partners set-
tled another Account between themselves, and in settling
that Account they came to an Agreement that the Debts
of two particular Persons who were Creditors to them here
in *England*, should not be estimated so high as they were,
by Reason that those Creditors were likely to prove a good
Deal insolvent, and therefore in that Account they agreed
between themselves, that those Debts should be set at a
lower Value, which Value they fix’d upon between them-
selves. At *Christmas* 1737 they settled another Account, and
in that Account came to a like Agreement in Relation to
two other Creditors here in *England*. About nine Months
after this Account was settled, *Thomas Gainsborough* died
leaving *John Gainsborough* his Executor.

The present Bill was brought by *John Gainsborough* a-
gainst *Stork*, praying that an Account might be taken of
the Partnership Dealings between *Stork* and the Plaintiff’s
Testator.

The Defendant by his Answer submitted to an Account,
but insisted, that in taking thereof he ought not to be
bound to take the foreign outstanding Debts which accrew-
ed since the Time of the last mentioned Account to the
Time of the Testator’s Death, and at most not till those
Debts should happen to gotten in.

Lord Chancellor said his Opinion was, That the Defendant was not warranted to insist on what he did by his Answer; he said there were two Things proper for his Consideration; 1st, What was the Construction of the Articles. 2^{dly}, What Variation is made in them by the Indorsement. With regard to the Articles the Fact was in this Manner. Here were two Persons entering into a Partnership for the carrying on a Trade together to *New England*. By these Articles they laid down Rules for governing themselves in this Trade. One was, that Accounts should be made up between them every Year at *Christmas*, and that if any Error should happen to be made in stating those Accounts, it should be taken Advantage of during the Life-time of both Parties. It is very manifest from this, that their Intention was, that their Representatives should not be intangled in their Accounts after their Decease. This was a very reasonable Intention, and to this End it was, that the Articles provided, that in Case of the Death of either of the Parties, the surviving Partner should give Security to the Representative of the deceased Partner to pay the Balance of the last Account settled in their Life-time, namely, so much Money as the Share of such deceased Partner amounted to at that Time, and that was to be a Discharge for the Whole that the Representative should be intitled to arising from this Partnership. And notwithstanding the Objection made by the Counsel for the Defendant, that

Lord Chancellor said, that that Objection was not material, for at the Time of entering into the Articles the Parties had a Prospect that they should have a profitable Trade. And tho' *Gainsborough* contributed but one Third of the Stock; yet it was intended between them, in Case he had survived *Stork*, that he should have been intitled to all the Profits arising from this Trade between the last Account and the Death of the other Partner, upon his giving Security to pay such Share of the last stated Account as the Representative was intitled to. The Partners might have had various

rious Reasons for intending that no farther Account should be taken than the last Account which was settled in their Life-time. Such Account could not be taken but under a Disadvantage to the Representatives of the Partner deceased. And besides, if such Representative had been intitled to have had another Account to be taken, and in Consequence thereof to have had a Power of calling in the Debts due to the Partnership, the calling them in might have been a Prejudice to the Trade. Under this Intention of the Parties is the Agreement that they enter into. It is that if either of the Parties should die during the fourteen Years intended for the Copartnership, and after an Account passed between them, then the surviving Partner should take to his own Use all the Goods, Ready Money, and Things which on the last casting up before such Death should happen to be in Stock between them, and should pay or satisfy to the Executors or Administrators of the deceased Partner, so much Money as the Share of such deceased Partner amounted to at the Time of such last Account made, and the surviving Partner should satisfy and pay to the Executors or Administrators of the deceased Partner their Share of such Stock in the Manner as therein directed; that for securing the several Payments the surviving Partner was to give a Bond as is there directed; and upon the doing of this, the Representative of the Partner deceased was to give a general Release. It is insisted on the Part of the Defendant, that the Words in these Articles do not extend to oblige the surviving Partner to take upon himself the outstanding Debts contained in the last Account, the Words being only, *All the Goods, Ready Money and Things*, but the Word *Things* does extend to Debts, and is as general a Word as could well be made Use of. Besides the Articles go on and say, that the surviving Partner should pay or satisfy to the Executors or Administrators of the deceased Partner so much Money as the Share of such deceased Partner amounted to at the Time of such last Account. The Articles provide likewise, that the surviving Partner should satisfy and pay to the Executors or Administrators of the deceased Partner the Share of such Stock.

Stock. Which Clauses evidently shew, that their Debts must be intended to be comprised, as well as the other Part of their Effects; and that which shews this farther is, that the Bond was to be given within twenty Days after the Death of the Partner deceased. From which it is plain, that no new Account was intended to be had after the Death of either of the Partners. The Question remaining to be considered is, What Variation in the Agreement is made by the Indorsement? The Indorsement has a Reference to the Articles, and must be explained by them. The Substance of this Part of the Articles that has been mentioned is recited in the Indorsement. The Recital mentions the Purport of the Articles to be, that the surviving Partner should take to himself the *Stock and Effects*. Which Words are a farther Illustration that the Debts were intended to be comprised in the Articles. The Recital farther goes on, that in all Probability there would be Debts outstanding in *New England* and other Parts beyond Sea. This is a plain Declaration, that Debts were included in the Articles, and that even Debts beyond Sea were comprised within the Meaning of it. The Indorsement then recites the Damage that may happen to the surviving Partner by the foreign Debts; and thereupon it provides, that in case either of them should die before the Expiration of the Partnership, that the surviving Partner should not be accountable or liable to pay the Executor of the deceased Partner for any outstanding Debts in *New England*, or any other Part beyond Sea, which at such Death were due to the Joint-Trade, by the Partners Consignment of their Effects to their Correspondents at *New England*, or any other Part abroad, on their own Account, otherwise than as the same Effects shall from Time to Time be gotten in and received by the surviving Partner, and then only for the Share thereof of the Partner so dying. It has been insisted on the one Hand by the Counsel for the Plaintiff, that this Indorsement relates only to foreign outstanding Debts, which should be contained in the last stated Account before the Death of one of the

What Variation in Articles of Partnership shall be said to be made by the Indorsement

What Words in an Indorsement on Articles of Copartner-ship only extend to such foreign Debts, as should be contained in the last stated Account before the Death of one of the Partners, and do not extend to such foreign Debts, as should happen to be contracted between the last stated Account and the Death of one of the Partners.

How far Words shall be construed *secundum subjectam materiam*.

Partners. On the other Hand it has been insisted by the Counsel for the Defendant, that not only those foreign Debts are included within the Indorsement, but that the Indorsement extends to all such foreign Debts as should be outstanding at the Time of the Death of either of the Partners. But his Lordship said his Opinion was, that by the plain Construction of this Indorsement it only extended to such foreign Debts as should be contained in the last stated Account before the Death of one of the Partners. The Indorsement recites the Articles, and by those Articles only such foreign Debts were included as did exist before the last stated Account previous to the Death of one of the Partners. It recites the Damage that would attend the surviving Partner, by taking upon him such Debts. And then the Indorsement provides, that in case either of them should die before the Expiration of the Partnership, that the surviving Partner should not be accountable or liable to pay the Executors of the deceased Partner, for any outstanding Debts in *New England* or any other Parts beyond Sea, which at such Death were due to the Joint-Trade, by the Partners Consignment of their Effects to their Correspondents at *New England* or other Parts abroad, on their own Account, otherwise than as the same Effects should from Time to Time be gotten in, and received by the surviving Partner, and then only for the Share thereof of the Partner so dying. The Words relied upon by the Counsel for the Defendant are, *Which at such Death was due*; and from thence it is inferred, that all foreign Debts are included which were outstanding at the Time of such Death. It is indeed true, that if these Words had stood by themselves, they would have included all the foreign Debts which were outstanding at the Time of such Death; but as the Indorsement has a Reference to the Articles, wherein only such foreign Debts were included which were outstanding at the Time of the last stated Account previous to the Death of the Partners, these Words in it must be construed *secundum subjectam materiam*. And it is impossible that any other Debts could be meant by the Partners, there being

no other Debts of which it could be said, that the surviving Partner would be prejudiced, according to the Articles, by accepting of them. The Articles did not extend to require the surviving Partner to take upon him any other Debts but those that were outstanding at the Time of the last stated Account, previous to the Death of one of the Partners, and therefore the Damage to the surviving Partner could alone arise from his being obliged to accept such Sort of Debts only; and the Words of the Indorsement are in the Negative, *That the surviving Partner should not be accountable or liable*, which imply, that under the Articles he would be liable; besides too, in the Accounts which the Partners made up between themselves in the *Christmas* immediately subsequent to this Indorsement, they came to an Agreement between themselves, That the Debts of two particular Persons who were Debtors to them here in *England* should not be estimated so high as they were, by reason that those Debtors were likely to prove a good deal insolvent, and therefore in that Account they agreed between themselves that those Debts should be set at a lower Value, which Value they fix'd upon between themselves. Afterwards at *Christmas* 1737 they settled another Account, and in that Account came to a like Agreement in relation to two other Debtors here in *England*. That is an Argument that no other Debts were in the View and Design of the Partners, but those that were outstanding at the last Account. And so his Lordship was pleased to decree accordingly.

Fell and Lutwidge.

February 3.

CAPT. *John Fell* had the Command of a Merchant Ship, and had likewise a Share in her as being an Owner. In 1730 he sent a Letter to *Lutwidge*, thereby desiring him to get 200*l.* insured upon her. Thereupon *Lutwidge* procured *Watson* and *Thornton*, who were two Correspondents of his, to insure this Money upon her.
In

In the Policy of Assurance *Lutwidge's* Name was made use of instead of the Captain's, which was done by the Captain's Direction, the two Insurers knowing nothing of him. In this Voyage the Ship was lost, and the Captain cast away. As soon as his Death was known *Eleanor* his Widow sent a Letter to the two Insurers, acquainting them with the Loss that had happen'd, telling them too, that *Lutwidge* was only a Trustee in the Policy for her late Husband, and requiring them not to pay the Money to *Lutwidge*, but to her only. However, under Pretence that the Captain was indebted to *Lutwidge*, *Lutwidge* procur'd the Insurers to give him Credit for the Sum, in an Account which they afterwards made up with him, and then the Balance of that Account was carry'd into a new Account; which second Account was afterwards settled between them.

After this *Eleanor* intermarried with *Samuel Fell*; and the present Bill was brought by her and her second Husband against *Lutwidge* and the two Insurers, in order to have the Money which was insured on the Policy.

On the Hearing of this Cause an Exception was first of all taken, that *Eleanor* had only taken out Administration to her late Husband in *December* last, which was a long Time after the Filing of the Bill, and therefore that the Bill was brought too early.

A Person may be allowed to bring a Bill as Administrator before Administration actually taken out.

Lord Chancellor said it was very true, that this would have been an Exception in an Action at Law, but that it was not so to a Bill brought in this Court; accordingly the Exception was over-ruled. This Exception being over, the Parties went into their Evidence, which was to the Effect before stated, and then his Lordship delivered his Opinion on it. He said it seem'd to him to be a very plain Case, that the Plaintiffs were intitled to Relief. He observ'd, that this seem'd to him to be a Contrivance by *Lutwidge*, in order to apply this Money to the Payment of a Debt which he now insists the Captain owed him. Whether he did

did owe him such a Debt does not appear; for nothing of that Debt is proved in the Cause. But supposing such a Debt was prov'd it would not differ the Case, by reason that *Lutwidge* was a bare Trustee for him. If the Insurers had paid this Money to *Lutwidge*, without having Notice that he was a Trustee, no Body could have said but they would have been indemnified in what they had done. But it appears by the Evidence in this Cause, that long Time before they accounted with *Lutwidge* for the Money, they had Notice given them that he was a Trustee, with Directions at the same Time not to pay the Money to *Lutwidge*. Notwithstanding this, *Lutwidge* carries on a Correspondence with them in Writing, tells them, that the Captain is indebted to him, and procures them to give him Credit for this Sum of Money in an Account. The Defence which the Insurers make is, that their having allow'd to *Lutwidge* this Sum of Money in one Account which they made up with him, and the Balance of that Account being carried into a Second one, which was afterwards settled, amounts to a Payment of this Money to *Lutwidge*. But notwithstanding this should amount to a Payment, still it is a Payment with Notice that *Lutwidge* was a bare Trustee, and with Directions not to pay the Money to him, but to the Widow, that was intitled to Administration. Besides, however it might have been a Defence for them, in case they had made an actual Payment of this Money to *Lutwidge*, or in case *Lutwidge* had brought his Action against them, the Fact in the present Case is, that the Money is actually at home. And will this Court suffer a Person, having Notice of a Trust, to make up an Account with a Trustee against the Direction of the *Cestuy que Trust*? The Court never does this. Strictly the Money in the present Case is in the Hands of the Insurers. The allowing it in an Account, in the Manner that they had done, does not alter the Property. The proper Decree for the Court to make is, that the Insurers shall pay this Money to the Plaintiff. With regard to the Insurers, it must be struck out of the Account which they

A Person shall not be allowed to detain to himself the Money due upon a Policy of Assurance, where in his Name was only made use of as a Trustee, under Pretence that the *Cestuy que Trust* was indebted to him.

How far the allowing another a Sum of Money in one Account, and the Balance of that Account being carried into another Account, which was afterwards settled, amounts to a Payment of that Sum.

How far the Paying a Sum of Money to a Trustee will be a Defence.

A Person having Notice of a Trust shall not be allowed to make up an Account with a Trustee against the Direction of the *Cestuy que Trust*.

Where a
Trustee shall
pay the Costs
of a Suit.

Where the
Allowing a
Sum of Mo-
ney in an Ac-
count shall a-
mount to a
Payment as
to a Trustee,
but not as to
the *Cestuy que*
Trust.

When a
Trustee of a
Policy of Af-
surance has

Costs decreed against him, he shall be allowed to deduct out of those Costs the Money he had advanced by Way of Premium upon the Policy, and the other Charges which he was at in obtaining it.

have settled with *Lutwidge*, and *Lutwidge* must pay the Costs of this Suit. He has been the Person that has drawn the Insurers in, and has prevailed on them to allow him this Money in their Account. As to him indeed this is to be considered as a Payment, but not as to the Plaintiffs. He has made a Representation to the Insurers, that the Person whom the Plaintiffs represent was indebted to him, whereas nothing of that Debt is prov'd; and if it had been proved it would have made no Difference. However *Lutwidge* must be allowed to deduct out of the Costs the Premium that he had advanced in procuring the Policy, and the other Charges that he was at in obtaining the Policy. And so his Lordship was pleased to decree accordingly.

February 5.

Anonymus Case.

Where an
Injunction
had been
granted upon
the original
Bill, the
granting a-
nother upon
the amended
one would
have been ir-
regular; but
as no Injun-
ction was
granted upon
the original
One, the granting it upon the amended one was regular enough.

AN Injunction had been granted upon an amended Bill, without any Injunction granted upon the original One. It was now moved to discharge the Order for the Injunction as irregular, by reason that it was granted upon the amended Bill.

Lord Chancellor said it was very true, that if an Injunction had been granted upon the original Bill, the granting another upon the amended one would have been irregular. But as no Injunction was granted upon the original One, the granting it upon the amended One was regular enough. His Lordship said he took it, that this was the constant Distinction, and the Register confirmed the same. Accordingly the Motion was refused.

Saunders and The Dean and Chapter of Bristol. February 5.

DR. — the late Dean of *Bristol*, together with the Majority of the then Prebends, made a Lease to *Saunders* of some Houses in *Bristol* with twenty Acres of Land adjoining to them, for the Term of forty Years. The late Dean of *Bristol* was promoted to the Deanery of *Wells*, and there was a considerable Change in the Prebends by Death and otherwise. The present Dean and Chapter determined to avoid this Lease, by Reason that the Statute of 13 *Eliz. cap. 10.* which allows Leases by Ecclesiastical Persons of Houses in Cities for forty Years, allows of such Leases only where the Houses are let, with ten Acres of Land belonging to them. For this Purpose they brought Ejectments against *Saunders*. Thereupon *Saunders* filed his Bill against the present Dean and Chapter of *Bristol*, and against the late Dean, praying that the present Dean and Chapter might make him a Lease for twenty-one Years, which was such a one as the late Dean and Chapter might have made, and that the late Dean might refund such Part of the Fine in Proportion, as a Fine upon a Lease for twenty-one Years would have born to a Fine upon a Lease for forty Years.

When a Dean and Chapter make a Church-Lease for a greater Number of Years than they can justify, and the Dean and most of the Prebendaries are changed, where a Bill may be brought a-

It was now moved upon the coming in of the Answers, that the Injunction might be continued till the Hearing of the Cause.

against the present Dean and Chapter, and likewise against the former Dean and Chapter, praying that the present Dean and Chapter may make the Party such Lease as they can by Law, and that the former Dean and Chapter may refund such Part of the Fine in Proportion, as a Fine upon a Lease for twenty-one Years would have born to a Fine upon a Lease for forty Years.

Lord Chancellor said, that the Question relating to the Merits of the Cause was such a one as he never knew to be determined. The proper Direction therefore to be given in the present Case, he said, was, that the Injunction

Where an Injunction shall be continued till

the Hearing, upon the Plaintiff's consenting to deliver Possession on the Hearing, and to account as the Court should direct.

should

should be continued to the Hearing, on the Plaintiff's Consenting to deliver Possession on the Hearing, and to account as the Court should direct. And so his Lordship was pleased to order accordingly.

February 5.

Anonymus Case.

A Decree of Foreclosure had been made against the Defendant, and the Time for redeeming was expired according to the Computation of Lunary Months.

It was now moved that the Defendant might stand absolutely foreclosed.

When a Decree of Foreclosure is made, the Time for redeeming must be computed according to

But *Lord Chancellor* was of Opinion, that the Computation in this Case ought to be according to Kalendar Months, and not according to Lunary ones. Accordingly the Motion was refused, and a farther Time appointed for the Payment of the Money.

Kalendar Months, and not according to Lunary ones.

February 7.

Harrison and Pryse.

IN 1720 *Edward Harrison*, who had been Governor in the *East-Indies*, made a Purchase of 1000 *l.* *South-Sea* Stock, and accepted it in the *South-Sea* Books a short Time after he had bought it. There was likewise another *Edward Harrison*, who at the same Time was Owner of some *South-Sea* Stock, and he was known by the Description of *Edward Harrison* of *Red-lion Square*. By some Means or other this last mentioned *Edward Harrison* got the 1000 *l.* which belonged to Governor *Harrison*, placed to his Account in the *South-Sea* Books, under the Description of 1000 *l.* Stock belonging to *Edward Harrison* of *Red-lion Square*. In 1725 the same *Edward Harrison* transferred this 1000 *l.* *South-Sea* Stock to *Round*, who was his Broker,

Broker, in order that he might sell it for him, and afterwards *Round* did sell it for him accordingly. Governor *Harrison* died, and his Widow became his Representative. After the Governor's Death this Fraud was discovered, and his Widow made a Demand upon the other *Edward Harrison*, in order that he should make her a Satisfaction for the Injustice. As soon as the Demand was made upon him, he was struck with a great deal of Confusion, and died the Day after.

The present Bill was brought by the personal Representative of the Governor against *Pryse*, who was the personal Representative of *Edward Harrison* of *Red-lion Square*, and likewise against the *South-Sea Company*, in order to have a Satisfaction for this Fraud.

On the Hearing of this Cause it was objected, that *Round* ought to have been made a Defendant.

But *Lord Chancellor* said his Opinion was, That there was no Occasion for it; he said it was very true, that where a real Estate is in the Hands of a Trustee, and the Trustee conveys it over to another who has no Notice of the Trust, if a Bill is brought by the *Cestuy que Trust*, the Trustee must be made a Defendant. But in the present Case this is not necessary; and it may be compared to that of a Man's Goods coming into the Hands of different Persons one after another; in which Case an Action of Trover may be brought against any of the Persons that has ever had the Possession of the Goods, without making the other Persons Defendants. With regard to the Merits of the Question, his Lordship said his Opinion clearly was, that the Plaintiff was intitled to Relief against *Pryse*. The only Thing material to be consider'd with regard to him, is what shall be the principal Sum which the Plaintiff is intitled to charge him with. And that Question depends upon this, whether the gross Sum is to be computed according to the Price that Stock bore at the Time the 1000 *l.* capital

Where a real Estate is in the Hands of a Trustee, and the Trustee conveys it over to another who has no Notice of the Trust; if a Bill is brought by the *Cestuy que Trust*, the Trustee must be made Defendants.

Where a Person who has had the mean Possession of Goods need not be made a Defendant to a Bill.

At what Time the Price of Stock shall be computed.

What Act
shall not a-
mount to a
Conversion
of Stock to a
Person's
own Use.

Where a
Company
may be liable
to make Sa-
tisfaction
for Stock, in
Case another
Person be
not sufficient
to make the
Party a Sa-
tisfaction.

tal Stock was transferred to *Round*, or whether only according to the Price that Stock bore at the Time the 1000 *l.* Capital was fold out by *Round*. Now his Lordship's Opinion was, that this Defendant was only chargeable according to the Price that Stock bore at the Time the 1000 *l.* capital was fold out by *Round*. His Lordship said here was no Conversion of the Stock till that Time. The transferring it to *Round* was no Conversion; that amounted to no more than making *Round* a bare Trustee of the Stock. 'Tis indeed true, that the Plaintiff has it in her Election, either to have this specifick Quantity of Stock now bought for her, which belong'd to the Governor, or else to have a Satisfaction for the Stock at the Time it was fold out, and thereby a Conversion made of it. But that which makes the Conversion is, as has been before said, the Selling it out by *Round*. It is uncertain at what Time it was that *Round* fold out this Stock; and therefore that Fact must be inquired into by the Master. There may be another Question in this Cause relating to the Defendants, the *South-Sea* Company, of a much more difficult Nature than what regards the Defendant *Pryse*, and that is how far the Company may be liable to make the Plaintiff a Satisfaction, in Case there are not sufficient Assets in the Hands of *Pryse*. His Lordship seemed to incline to think, that the Company might be liable in Case there shall be no Sufficiency of Assets in *Pryse*'s Hands. His Reason was, that the Company must be considered as Trustees for the Governor at the Time he purchased this Stock; and as the Stock has not been transferred with any Privity of his, they must be considered as continuing his Trustees. But his Lordship said, that there would be no occasion to determine this Point till the Account be taken of the Assets in the Hands of *Pryse*. And so his Lordship was pleased to decree accordingly.

Lowther and Condon.

February 9.

J. C. 2. M. 127.

THOMAS Condon made his Will, wherein were these Words;

“ *Imprimis*, I give and bequeath unto my Daughters *Isabella Condon* and *Diana Condon* the Sum of 500 *l.* a-piece,
“ to be raised and paid unto them, and each of them, immediately after my Death, out of the Rents, Issues and
“ Profits of my Lands and Tenements, in *Old Newton*,
“ *Butterwick* and *Boythorpe* in the County of *York*, or by
“ Sales or Mortgages of the same, or a competent Part
“ thereof, together with Interest for the said respective
“ Sums, after the Rate of 6 *l.* per Cent. per Ann. from the
“ Time of my Decease, until the several respective Sums
“ of 500 *l.* shall be duly paid to my said Daughters,
“ or their respective Executors, Administrators or Assigns.

“ *Item*, I give and bequeath unto each of my said
“ Daughters the Sum of 1000 *l.* to be raised, and to
“ be paid unto them severally and respectively, immediately after the Decease of my Wife, out of the
“ Rents, Issues and Profits of my Manors, Lands, Tenements and Hereditaments in *Willoughby* in the said
“ County of *York*, or by Sale or Mortgage of the same,
“ or competent Part thereof, together with Interest for
“ the said several Sums of 1000 *l.* after the Rate aforesaid, from the Decease of my said Wife, until the same
“ Sums shall be duly paid to my said Daughters, or their
“ respective Executors, Administrators or Assigns. And
“ my further Will is, that in case either of my said
“ Daughters shall depart this Life before me, then the
“ Survivor of my said Daughters, her Executors, Administrators and Assigns, shall have and receive all and
“ every the Sum and Sums of Money herein before by
“ me devised out of my said Lands, to be raised in the
“ Man-

“ Manner herein before appointed. And in such case
 “ the Part of the Daughter so dying shall not cease, or
 “ sink into the Estate for the Benefit of my Heir, but
 “ shall remain, and be raised for the Benefit of my
 “ Daughters.

“ *Lastly*, I bequeath all my Chattels real and personal,
 “ and all my Goods moveable and immoveable, and all
 “ my personal Estate whatsoever, unto my said Daugh-
 “ ters, and do make and constitute them Executors of this
 “ my last Will and Testament. In Witness, &c.”

The Testator died and left one Son *Thomas*, and Two Daughters, *Diana* and *Isabella*. In 1719, which was after the Testator's Death, *Diana* intermarried with Sir *William Lowther*. In 1736 *Diana* died. In the Year following *Anne* the Mother died.

The present Bill was brought by Sir *William Lowther* against *Thomas Condon* and *Isabella*, who had intermarried with *Pit*, in order to have the Sum of 1000*l.* mentioned in the Will, raised out of the Estate which was thereby charged with it.

How far a
 Legacy,
 which is
 charged upon
 the real E-
 state, shall be
 said to be a
 vested one.

Lord Chancellor said his Opinion was, That the 1000*l.* ought to be raised out of that Estate. He said it was very true, that there is an established and fix'd Distinction between Legacies charg'd upon the personal Estate, and Legacies charged upon the Real. And though this would clearly have been a vested Legacy, in case it had been chargeable upon the personal Estate, yet it is not so clear a Case as it is chargeable upon the Real. But though the Case is not so clear as it would have been, if the Legacy had been chargeable upon the personal Estate, yet there is sufficient Ground to say, that even in the present Case the Legacy shall be a vested one, and the Plaintiff intitled to it. The Words of the Will are in this Manner; *I give and bequeath to each of my Two Daughters the Sum of 1000*l.* to be raised, and to be paid unto them severally and respectively immediately after the Decease*

Decease of my Wife. So that it is a Gift immediate to the Daughters, though not indeed to be raised till after the Death of the Testator's Wife. The Time mentioned in the Will is not annexed to the Substance of the Legacy, but to the Payment of it; and consequently, if this had been a Legacy chargeable upon the personal Estate, it would have been clearly a vested one, and the Plaintiff intitled to it. It must be admitted indeed, that the Legacy in Question is not chargeable upon the personal Estate, but chargeable upon the Real; for which Reason it must be owned, that it is equally an established Rule, that where a Legacy of that Sort is given, though the Time mentioned in the Will is annexed to the Payment of it, and not to the Body and Substance of the Legacy, yet in general such Legacies shall not be raised when the Legatee dies before the Time for Payment of it; and this is so more especially where a Legacy of that Sort is given by way of Portion. But notwithstanding this is the general Rule, yet the principal Ingredient which has given Rise to this Doctrine has been, that the Postponing the Payment of the Legacy has appear'd to have arose from Circumstances on the Part of the Legatee, as Attaining the Age of Twenty-one, or Marriage, or the like; there if the Legatee dies before the Time of Payment of the Legacy, this Court, which favours the real Estate, has consider'd it that there is no Occasion that it should be raised, the Party dying who was in the immediate Contemplation of the Testator. But where the Postponing the Time of Payment of a Legacy has been owing to the Circumstances of the Estate of the Testator, and not to the Circumstances of the Legatee, that is not so strong a Case to favour the Legacy's sinking into the Estate as the other is, though his Lordship said he did not know but that the Cases may have gone so far as even there in some Instances to allow of a Sinking. But this has been determined,

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When a Legacy shall be said to be an immediate Gift to another upon the Death of the Testator, tho' not to be raised till a future Day.

Where the Time mentioned in the Will shall not be annexed to the Substance of a Legacy but to the Payment of it.

When a Legacy is charged upon the real Estate, tho' the Time mentioned in the Will is annex'd to the Payment of it, and not to the Body and Substance of the Legacy, yet in general such Legacies shall not be raised, where the Legatee dies before the Payment of it.

Where the Postponing the Time of Payment of a Legacy has been owing to the Circumstances of the Estate of the Testator, that is not so strong

a Case to favour the Legacy's sinking into the Estate as the other is, though his Lordship said he did not know, but that the Cases may have gone so far as even there in some Instances to allow of a Sinking.

Where a Legacy charged upon Land depends upon Two Contingencies, and one of them does not happen, the Legacy shall be raised.

Prec. in
Chan. 351.

Tho' a Legacy is charged upon the real Estate, and the Legatee dies before the Time appointed for the Payment of it, where the Intent of the Testator shall be said to appear that the Legacy shall be raised notwithstanding.

When a Legacy is charged upon the real Estate, and the Legatee dies before the Time for Payment of it, where no Argument can be drawn in favour of its being raised from the Circumstance of its being directed to be paid with Interest.

Tho' a Legacy is charged upon the real Estate, and the Legatee dies before the Time for Payment of it, where an Argument may be drawn from the Circum-

stance of the

ned, that where a Legacy charged upon Land depends upon Two Contingencies, and one of them does not happen, but the other does, the Legacy shall be raised. That was the Case of *King and Withers*. However in the present Case 'tis clear, upon the Penning of the Will, that the Intention of the Testator was, that the Legacy in Question should be raised in favour of the Plaintiff. Here 1000 l. is given to each of the Daughters, with Interest, to be computed from the Death of the Testator's Wife. No Argument indeed can be drawn from the Circumstance relating to Interest, for it was natural to give a Direction about that in that Manner. But then the Will goes on and directs, that this Legacy shall be paid to the Daughters their respective Executors, Administrators and Assigns; and something may be inferr'd from thence in favour of the Plaintiff. It has been indeed said, that the Use of this Clause might be only to shew the Testator's Intention, that if the Daughters survived the Mother, and afterwards died, the Legacies should be paid to their Representatives; but if that was the Meaning of the Testator, the inserting this Clause was very unnecessary; for if the Daughters survived the Mother there could be no Doubt but that the Representatives of them would be intitled to the Legacy of Course. The Use of this Clause seems rather to be to shew the Testator's Intention, that if the Daughters died in the Life of their Mother, and after the Testator's Death, that the Legacies should be paid to their Representatives. But his Lordship said that he did not rest his Opinion upon this Clause in the Will; the Clause that he founded himself principally upon was that which is in the Words following; *And my farther Will is, that in case either of my said Daughters shall depart this Life before me, then the Survivor of my said Daughters, her Executors, Administrators and Assigns, shall have and receive all and every the Sum and Sums of Money herein before by me devised out of my said Lands, to be raised in the Manner herein before appointed. And in such Case the Part of the Daughter so dying shall*

the Testator's directing, that the Legacy shall be paid to the Party, his Executors, Administrators and Assigns, that the Legacy shall be raised notwithstanding.

shall not cease, or sink into the Estate for the Benefit of my Heir, but shall remain and be raised for the Benefit of my Daughters.

It has been said, that the Contingency, upon which this Clause of the Will was to take Effect, has not happen'd; but it is plain that the Testator had in his View a certain Case wherein the Legacy should not sink into the Estate; that Case was the Event of either of the Daughters dying in the Life of the Testator. And if even in that Case the Testator design'd that the Legacy should not sink into the Estate, much stronger Reason is there to infer, that he did not design this when the Daughter survived him. This Clause is a plain Indication of the Testator's Design that the Daughters should have this Legacy at all Events, and that it should not depend upon the Accident of their dying in the Life of their Mother. It has been said, that, if the Testator had been asked at the Time of making his Will, whether on such an Event as has happen'd he would have the 1000*l.* Legacy raised for the Plaintiff, he certainly would have answered that he would not. But this Manner of arguing, by asking a Question of this Sort, is a very uncertain one; those that ask the Question answer it themselves, and they give such an Answer as serves for their Purpose. But if this Question had in reality been asked the Testator, his Lordship said, he should have thought it much more probable, that under the Circumstances of the present Case the Testator would have answer'd, that his Meaning was, that the Plaintiff should have this Legacy. The Plaintiff married this Lady in 1719. she did not die till 1736, and it would be a reasonable Thing in it self, that under such Circumstances the Testator should intend that the Plaintiff should have this Legacy. As to Mrs. Pitt, his Lordship's Opinion was, That there was no Foundation that she should be intitled to this Legacy, her Sister not having died in the Testator's Life-time. And so his Lordship was pleased to decree accordingly.

When Legacies are charged on the real Estate, and one of the Legatees dies before the Time for Payment of it, yet the Testator's directing that the Legacies shall survive in case that either of them die in his Life-time, shall be an Evidence of his Intention, that the Legacy shall be raised tho' one of the Legatees died after the Testator, and before the Time for Payment of it.

N. B. On the 6th of *June* following this Cause was reheard, but the Decree was affirmed.

Glass

February 10.

Glass and Oxenham.

WILLIAM Long made his Will, and thereby made Anne Long his Executrix, when she should attain her Age of Twenty-one. After the Testator's Death Palmer took out Administration *Durante minore Ætate* of Anne. Anne afterwards became of Age, and then intermarried with Oxenham. Palmer died, and ——— became his Representative.

The present Bill was brought against the Executrix of William Long, and pray'd, amongst other Things, to have an Account of his personal Estate.

A. is made an Executrix ; she being an Infant Administration Durante minore Ætate is committed to B. A. afterwards

Lord Chancellor was of Opinion, That the Representative of Palmer ought to be made a Defendant to this Bill. He said, that in Bills of this Sort, all Persons who have possessed themselves of the Testator's Estate ought to be made Defendants. And so his Lordship was pleased to order accordingly.

comes of Age. B. dies, and C. becomes his Representative ; on a Bill brought against A. for an Account of the personal Estate of her Testator, C. must be made a Defendant.

In Bills of this Sort all Persons who have possessed themselves of the Testator's Estate ought to be made Defendants.

February 12.

Brinsdel and Sir John Tompson.

THE Plaintiff had obtained three Orders at several Times, for Liberty to amend his Bill on Payment of Twenty Shillings Costs ; and under these Orders had amended his Bill accordingly. After this he moved for a fourth Order to amend upon the like Terms.

At the Time that Motion was made the Defendant's Counsel opposed it, submitting it that he ought to pay full Costs. But the Court inclining to allow of the Amendment,

ment, he consented to it upon the Plaintiff's agreeing to wave the Exceptions which he had taken to the Answer. As soon as this last Order was obtained the Plaintiff amended his Bill by adding a new Ingrossment of fifteen Sheets. It was now moved, that this last Order might be discharged, or else that the Plaintiff might pay full Costs for the Amendment, to be taxed by the Master.

Lord Chancellor said, when three or four Orders are obtained for the Amendment of a Bill, and new Ingrossments made under those Orders, that the Rule of the Court is, if the Plaintiff moves for farther Liberty to amend his Bill, he shall pay full Costs to be taxed. But here at the Time the last Order was made the Motion was defended, and there was a Consent. For which Reason his Lordship did not think proper to discharge the Order which had been made, or to require that full Costs should be paid. Accordingly the Motion was refused.

When 3 or 4 Orders are obtained for the Amendment of a Bill, and new Ingrossments made under those Orders, the Rule of the Court is, if the Plaintiff moves for farther Liberty to a-

mend his Bill, he shall pay full Costs to be taxed.

----- and *Andrews.*

February 12.

THE present Bill was brought in order to prove a Will *per Testes*, and to perpetuate the Testimony of the Witnesses. The Defendant did only cross-examine the Plaintiff's Witnesses, and did not examine any Witnesses of his own. However, he afterwards brought a Cross Bill, in order to set aside this Will. It was now moved on Behalf of the Defendant in the original Cause, that the Plaintiff might pay him his Costs.

Lord Chancellor said, That the Defendant was intitled to the Benefit of this Motion. He has no other Way in this Case to have his Costs, than by moving for them.

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And

On a Bill brought to prove a Will, *per Testes*, and to perpetuate the Te-

stimony of his Witnesses, the Defendant has no other Remedy to have his Costs than by moving for them.

When a Bill is brought to prove a Will *per Testes*, and to perpetuate Testimony, tho' the Defendant has cross-examined the Plaintiff's Witnesses,

And though the Defendant has cross-examin'd the Plaintiff's Witnesses, yet as he has examined no Witnesses of his own he ought to be allowed his Costs. 'Tis indeed true, that the Defendant has filed his Cross Bill, and that Circumstance has been urged as a Reason, why these Costs should not be given till the Merits of the Cross Bill are determined, but that Circumstance will make no Difference. Accordingly the Motion was allowed.

yet if he has examined no Witnesses of his own, he ought to be allowed his Costs.

When a Bill is brought to prove a Will *per Testes*, and to perpetuate Testimony, where the Defendant shall be allowed his Costs, notwithstanding he has brought a Cross Bill.

At the Seals after Hilary Term 1740.

February 18.

Hathernthwaite and Russel.

IN April 1739 Robert Jeffson made his Will, and thereby devised a great Part of his real Estate from his Heir at Law, and bequeathed Part of his personal Estate amongst several of his Brothers and Sisters Children; the Residue of his personal Estate, and which was the greatest Part of it, he bequeathed to *Russel* and *Richmond*, who were Two of his Brothers and Sisters Children, and made them his Executors. At the Time of making this Will *Jeffson* was seised of a real Estate of 50 *l. per Ann.* and possessed of a personal Estate about the Value of 2700 *l.* At this Time *Jeffson* had Seven Brothers and Sisters Children, and all of them had something given them by the Will, excepting —, who intermarried with *James Hathernthwaite*. *Jeffson* died soon after making this Will. After his Death *Russel* and *Richmond* placed out upon Securities all the Money which was in their Hands belonging to the Estate of the Testator, excepting the Sum of 20 *l.* They endeavoured to get a Probate of the Will in the Archdeaconry-Court of *Richmond* in *Yorkshire*,

shire, but were opposed in it by *James Hathernthwaite* and his Wife, who enter'd a Caveat for that Purpose. The Ground of that Caveat was, that, as *James* and his Wife insisted, the Will was unduly obtained by *Russel*, and that *Jeffson* was in such a State of Mind at that Time as made him incapable of making one. Pending this Litigation in the Ecclesiastical Court, and before the Will was proved in common Form, *James* and his Wife brought their Bill in this Court against *Russel* and *Richmond*, suggesting the Litigation in the Ecclesiastical Court for the Reasons before-mentioned, and that *Russel* and *Richmond* were but of mean Abilities; whereupon the Bill prayed, that this Court would take Care of the personal Estate of the Testator during the Controversy in the Court below.

This Bill was filed in the last Term, and before that the Answers came in, or that the Defendants were in Contempt for not answering, or that they had even pray'd Time to answer, a Motion was now made, that the Defendants might bring into this Court such of the Securities which the Testator's personal Estate was out upon, and such of his Monies which were not out upon any Securities at all, and that a Receiver might be appointed. As a Ground of this Motion an Affidavit was produced, made by several Persons, setting forth several Circumstances of Fraud that were sworn to be made use of in obtaining this Will, and likewise setting forth that *Russel* and *Richmond* were but of mean Abilities. On the other Hand Affidavits were produced on the Part of the Defendants denying the Circumstances of Fraud and Incapacity, and swearing that *Russel* was a Carpenter, and worth 20 *l.* and that *Richmond* was worth 300 *l.* The other Relations, who took by the Will, sided with the Defendants in opposing the Motion, and the Heir at Law of the Testator submitted to the Will.

Where the Court will not make an Order upon an Executor, that he shall bring into Court such of the Securities which the Testator's personal Estate was out upon.

Where the Court will not make an Order that a Receiver shall be appointed of a Testator's personal Estate, by Reason that the Will is litigated, and that the Executor is not of sufficient Ability.

Lord

ecutor is not of sufficient Ability.

Lord Chancellor said his Opinion was, that the Motion ought not to be granted. He said it was very true, that where strong Circumstances have appeared of a Will's being unduly obtained, and where the Estate of the Testator has been in great Danger of being wasted, Motions of this Kind have been allowed. That was the Case of *Powis* and *Andrews*, determined by Lord *Harcourt*. There were Circumstances appearing of Insanity in the Testator, and of Fraud in obtaining the Will, and one of the Executors had got in Money of the Testator's Effects that stood out upon Securities. In the present Case there is hardly much Reason to think that there should be great Occasion for the Motion, it being now above twelve Months distance of Time since the Death of the Testator. Then what is there of Fraud appearing in the Manner of obtaining the present Will? 'Tis indeed true, that on the Part of the Plaintiff an Affidavit is produced, setting forth strong Circumstances of such Fraud; but those Circumstances are as fully denied by the Affidavits on the Part of the Defendants. The like Observation may be made with regard to the Insanity alleged to be in the Testator. In these Respects therefore the present Case greatly differs from that of *Powis* and *Andrews*. It differs from it likewise extreamly in another Respect, that there the Person who was made Executor was a meer Stranger to the Testator; but here the Persons who are Executors are equally related to the Testator, as the Wife of the Plaintiff herself is. And besides the Testator has given to all his Relations that were of equal Kindred to him with the Defendants Legacies, except to the Plaintiff's Wife. And with regard to the Behaviour of the Defendants since the Testator's Death, it appears that they have acted greatly for the Benefit of the Estate. For they have placed all the Money of the Testator's out upon Securities, which was in their Hands, excepting the Sum of 20*l.* which they have reserved to themselves. Then what is the Nature of the present Case? It comes to no more than this, that here is a Man who has left a Will
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behind him, concerning the Validity of which there is a Litigation in the Spiritual Court, and the Executors are Persons not of great Abilities. This is not such a Case as can require the Interposition of this Court. And as to what has been said, that the Will is not proved in common Form, that Circumstance is an Argument against the Court's interposing rather than otherwise. Accordingly the Motion was refused.

Where a Court of Equity will not interpose till a Will is proved in common Form.

Sir John Barnardiston and Lingwood. February 17.

IN May 1730 *John Barnardiston* came to an Agreement with *Lingwood*, for selling him a Remainder, which he had in the Manor of *Wratton Magna* for the Price of 300*l.* At the Time of this Agreement his Uncle *Sir Samuel Barnardiston* was Tenant for Life of this Estate, with Power to make a Jointure of it, with Remainder to his first and other Sons in Tail Male, the Remainder to *John Barnardiston*, the Father of the Contractor for Life, with Remainder to his first and other Sons in Tail Male. This Estate was of the yearly Value of 300*l. per Ann.* On the 15th of the same Instant *John* the Contractor received of *Lingwood* fifteen Guineas in Part of his Purchase-money. The Receipt which he gave was to the following Effect;

Received of Mr. Lingwood the Sum of fifteen Pounds, fifteen Shillings, in Part of the Purchase-money for the Sale of my Reversion in the Manor of Wratton Magna.

The Day following he received of *Lingwood* sixteen Guineas more on the like Account, and gave a Receipt of the same Nature. Soon after he received ten Guineas on the like Account, and gave the same Sort of Receipt. At a fourth Payment he received of *Lingwood* twenty Guineas, and then he gave a Receipt for so much Money for the Estate and Manor of *Wratton Magna* generally. At a fifth Pay-

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ment he received twenty-six Guineas. At a Sixth 10*l.* At a 7th 6*l.* 6*s.* At an 8th 20*l.* At a 9th 4*l.* 1*s.* At a 10th three Guineas, and at four other Times received four small Sums. All these last Receipts were in the same general Manner with the 4th which has been mentioned. In *January* 1730 the whole Money which he had received amounted to the Sum of 160*l.* and then upon the twenty-seventh of that same Month, a Conveyance was made by *John* to *Lingwood*. That Conveyance was made in the following Manner. It was by a single Deed of Bargain and Sale. The Consideration recited in it was the Sum of 300*l.* in Hand paid to *John* by *Lingwood*. And then by that Deed *John* conveyed to *Lingwood* the Manors of *Wratton Magna* and *Wratton Parva*, with all his Interest in the same, to have and to hold the said Manors to *Lingwood* and his Heirs, after the Death of Sir *Samuel* without Issue, and after the Death of his Father. In this Deed there was a Covenant for farther Assurance.

On the Back of this Deed there was no Indorsement of any Receipt of the Consideration-money. At the Time this Deed was executed, there was no Money paid down. But the Consideration was made up of the 160*l.* paid in the Manner before-mentioned; and likewise of promissory Notes given by *Lingwood* to *John*, whereby he undertook to pay the Remainder of the Money at different Times therein specified. These Notes were all of them paid off within about a Month's Time after the Execution of the Deed.

This Deed was drawn by *Woodcroft*, by the Direction of *John* as well as of *Lingwood*. *John* had no Writings of his Estate at this Time. And this Description of the Premises was given by *John* to *Woodcroft*. At the same Time that this Deed was executed, *John* gave a Warrant of Attorney to *Lingwood* to confess a Judgment for 6000*l.* and there was a Deed of Defeasance that he likewise then entered into, by
I which

which the Warrant of Attorney was agreed to be made void, in Case *John* should permit *Lingwood* quietly to enjoy the Premises after the Death of Sir *Samuel* without Issue, and after the Death of his Father; in Pursuance of the Warrant of Attorney, Judgment was afterwards entered up. In 1731 there were two other Notes given by *Lingwood* to *John*, upon another Account, payable at a future Day. The Money upon both Notes was often demanded, thereupon the Notes were discounted at 30 *per Cent.* In 1732 Sir *Samuel* intermarried with *Catharine*, the Sister of Sir *Rowland Wynn*. Sir *Samuel* was at that Time about fifty-two Years of Age, and the Lady was about twenty-eight. About 1733 *John* the Father of the Contractor died. In 1735 Sir *Samuel* died without Issue. His Lady was now living, and had a Jointure upon this Estate. By the Death of Sir *Samuel John* became a Baronet.

The present Bill was brought by Sir *John* against *Lingwood*, setting forth that the several Deeds before-mentioned were only made by Way of Security for such Sums of Money as were advanced by *Lingwood* to him, and praying that he might be relieved against them on Payment of what was *bonâ fide* due.

To this Bill *Lingwood* put in his Answer, and thereby insisted, that the Deeds were an absolute Purchase, and that he was intitled to the whole Benefit under them. The Bill was amended, and he put in a second Answer to the like Effect with the former.

The Bill was amended again, and then he swore, that since the putting in his former Answers he had recollected, that it was not the Intention of the Contract to include the Manor of *Wratton Parva*, and that this Manor was inserted in the Deed by Mistake. However he acknowledged this voluntarily, and there was nothing in any of the Bills that led to such an Inquiry.

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There was likewise a Cross Bill brought by *Lingwood* against Sir *John*, praying a specifick Execution of his Covenant with him for farther Assurance.

Where a Deed of Bargain and Sale shall not be good, even in Point of Law, for the Life of the Bargainor.

Where the Grant of a Remainder shall not be good in Point of Law, even during the Life of the Grantor, for want of sufficient Words in the Deed to pass the Remainder as an Interest to be immediately vested.

Lord Chancellor said his Opinion was, that the Plaintiff in the original Cause was intitled to Relief, and that the Cross Bill ought to be dismissed. He said he would first consider the Merits of the Cross Bill. The Cross Bill is brought to have a specifick Performance of an Agreement, and the Defect in a Conveyance supplied. In the Manner that this Conveyance is framed by the Deed of Bargain and Sale, he said he was inclined to think that it was absolutely void in Point of Law, even during the Life of Sir *John*, though perhaps it is not material to give any Opinion upon that Point. By this Deed Sir *John* conveys to *Lingwood* the Manors of *Wratton Magna* and *Wratton Parva*, to have and to hold the said Manors to *Lingwood*, his Heirs and Assigns, after the Decease of Sir *Samuel* without Issue, and after the Death of his Father. It has been said, that this is a good Conveyance in Point of Law, during the Life of Sir *John*, because he was seised of a Remainder in Tail, expectant on the Death of Sir *Samuel* without Issue, and expectant on the Death of his Father. But his Lordship said, he doubted that the Deed could not operate in that Manner, and that according to this Deed the Remainder was not intended to be even a vested Interest in *Lingwood* till the Death of Sir *Samuel* without Issue, and till the Death of the Plaintiff's Father; for by the Provision of this Deed nothing seems to be designed to vest in the Party till that Time. *Bray* and *Dekins* was a Case to this Purpose in the House of Lords. However, his Lordship said, that perhaps it was not material to give an Opinion upon this Point; for it is admitted by the Defendant's Counsel, that this is a defective Conveyance, and that if the Objection before mentioned was out of the Case, Sir *John* would thereby convey no more than *totum statum suum* during his own Life. The Question is, whether this Defect

Defect in the Conveyance ought to be aided in the present Case? And his Lordship was of Opinion that it ought not. In order to give an Opinion upon this Point there is no Occasion to consider, whether the Bargain was fraudulent or not, for if it is only a hard or unreasonable Bargain, that is a Reason sufficient why this Court will not give its Assistance. Now to shew that this is a hard and unequal Bargain, nothing can be plainer. Consider the Nature of the present Case; here is a young Gentleman that has a Remainder in Tail, expectant on the Death of his Uncle without Issue, and expectant on the Death of his Father; the Estate is of the Value of 300 *l. per Ann.* and he sells this Remainder for 300 *l.* At this Time he does not know what he sells; two Manors are inserted in the Deed, and it is agreed on all Hands, that it was designed that the Defendant should have but one of them; the one did not know what he sold, and the other did not know what he bought. Such a Contract as this the Court never assisted; and therefore it is extremely plain that there can be no Ground to give Relief on the Cross Bill. The next Question to be consider'd is, What is the Court to do in the present Case? To leave Things in the Situation that they are in it ought not; to do that would be to let Things stand in a State contrary to the Intention of all Parties; and to suffer the Defendant to carry into Execution the Judgment which was entered on the Warrant of Attorney, is that which the Court ought not to allow of under the Circumstances of the present Case. The right Thing to be done is to set aside the Deed as a Purchase, and to let it only stand as a Security for the Money that was advanced, and on Payment thereof to direct the Defendant to execute a Reconveyance, and to acknowledge Satisfaction upon the Judgment. The doing this will be agreeable to the Justice of the Case, and to the Precedents that have been in this Court. At the Time this Contract was enter'd into, the Plaintiff was a young Gentleman manifestly in Distress. The Manner of his receiving the Payments of the Money expressly speak this; he receives it by three Guineas, five

Where a defective Conveyance shall not be aided in a Court of Equity, by reason that it is a hard and unreasonable Contract.

What shall be said to be a hard and unreasonable Contract.

When an unreasonable Contract is enter'd into, where a Court of Equity ought in some Way or other to interfere.

Where a Court of Equity will set aside a Deed as a Purchase, and will only let it stand as a Security for the Money that was lent upon it.

Guineas, and six Guineas at a Time. He was intitled to an Interest in an Estate which was only contingent indeed on the Death of his Uncle without Issue; his Uncle, it is true, was not then married, however he was not so old but he might marry and have Children; in fact he did marry, though he afterwards died without Issue. The Party selling appears to have been in Circumstances liable to be imposed on, and to have had Advantages taken of him; then What is the Consideration? Only one Year's Purchase; a very small one. Besides, it appears in the present Case, that the Defendant was guilty either of an Imposition or at least a Mistake. It is admitted, that by the Deed two Manors are conveyed, whereas the Intention of the Parties confessedly was, that one only should pass. It has been said, that this could be nothing but a Mistake, because in the Receipts 'tis mentioned, that the Payments were made as the Consideration-Money for one Manor only. And 'tis indeed true, that in the three first Receipts this is so mentioned, but the subsequent Receipts are only for so much Money for the Estate and Manor of *Wratton* generally. And what confirms this to be more than a Mistake is, that the Defendant in his third Answer says, that since his putting in his former Answers he had recollected himself, and thereby acknowledges, that the Intention was only that *Wratton Magna* should pass. Now, What is this Recollection? The Defendant had stated the Matter very minutely in his former Answers. The Meaning of this could only be, that the Defendant only found it was inconsistent for him to insist upon both Manors, and therefore he abridges his Demand of one of them. To consider then the Manner of paying the Consideration-Money; the first Receipt was but for fifteen Guineas, the second for sixteen, the third for ten, the fourth for twenty; at a fifth Payment he received twenty-six Guineas, at a sixth ten Pounds, at a seventh six Pounds six Shillings, at an eighth twenty Pounds, at a ninth four Pounds ten Shillings, at a tenth three Guineas, and at four other Times he received four small Sums. These Things shew, that this

What shall
be said to be
more than a
Mistake.

Where a
Person shall
not be allow-
ed to say that
he discover'd
a Thing by
Recollection.

young Gentleman was in distressed Circumstances. He appears to have been under such a Distress as to have wanted Money for Bread and small Beer; and when this young Gentleman had got in pretty deep with the Defendant, then it is that he is put off with Notes of Hand; these Notes were payable, some at the Distance of a Month, others of them at a longer Time. Two other Notes that were given were forced to be discounted, and were paid with a great deal of Difficulty. But these Notes indeed are said to have been given upon another Occasion; it has been urged, that the Defendant run a Risque in his Purchase, and that the Interest which he bought was only a Chance; but that is the common Case in Transactions of this Nature; and though there is a Chance which the Party runs, yet where the Court sees that Advantages are taken of the Distress of a young Gentleman, the Court constantly relieves for the Sake of the Publick; and it is right that the Court should do so; for many Instances there are of money'd Men, who will part with a little to grasp at the Chance of a great deal. Upon the Whole, the Cross Bill must be dismissed with Costs. Upon the original Bill the Plaintiff must be relieved and have his Costs hitherto, but the subsequent Costs shall be reserved. And so his Lordship was pleased to decree accordingly.

Tho' there is a Chance which the Party runs, yet where the Court sees that Advantages are taken of the Distress of a young Gentleman, the Court constantly relieves for the Sake of the Publick.

Where the Court will

set aside a Purchase on the Account of the Publick.

Metcalf and The Royal Exchange Assurance Company. February 24.

IN 1726 a Partnership was carried on between Sir Thomas Mackworth, General Stewart, Parry, Hind and Brigs, for the Making and Manufacturing of Brasses and Copper. In that same Year Parry became a Bankrupt, and Sir Thomas Mackworth bought his Share in the Partnership Stock. In the same Year Sir Thomas Mackworth made an Assignment to George Robinson of the fourth Part of this Stock,

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in Consideration of 100 *l.* But it was sworn that *George* declared, that the Intention of his taking this Assignment was not to become a Partner in this Business, but only that the Assignment should stand as a Security for such Sums of Money as he should advance to Sir *Thomas*; and Sir *Thomas* swore, That the Intention of this Assignment was not, that *George* should become a Partner, but that he made it him merely for the Purpose of giving him a Vote at the Meeting of the Partners, in order that the Designs of Sir *Thomas* in carrying on the Works of this Partnership might be the better completed. And indeed 100 *l.* did not seem to be near the Value of a fourth Part of this Partnership Stock.

In 1729 Sir *Thomas* went to *Paris*, and whilst he was there he received a Letter from *George*, giving him an Account of some Success in this Trade. Sir *Thomas* writ him a Letter in answer to it, giving him some Directions in what Manner he would have the Works carried on; and there he mentioned this Expression, *A Profit to our selves*, alluding to no other Person in the Letter but to himself and *George*.

On the 25th of May 1730 an Agreement was enter'd into by *George* with Sir *Thomas* to the following Effect; "I do promise to be accountable to Sir *Thomas Mackworth* in Profit and Risque, for a Half in the Undertaking of Carrying on certain Copper Works; such Profit and Risque to be computed from the 25th of March last past; and I do agree to take such half Part of the Stock as the same has been estimated by the Servants of Sir *Thomas Mackworth*. Signed *George Robinson*." At the Bottom of this Paper Writing there was another Memorandum to this Effect; "Whereas *George Robinson* has signed an Agreement to the Purport before mentioned, I do hereby agree to the same. Signed *Thomas Mackworth*." After this Agreement was made, Receipts were given wherein the Names of Sir *Thomas* and *George* were men-

mentioned, and several Sums were advanced by *George* in order to carry on this Trade.

Afterwards in the same Year *Sir Thomas* made a Purchase of some Copper of *Paz* and *Bozalio*, and paid them the Money for it himself. They swore, That they understood it, that he made this Purchase of them on his own private Account. However, the Receipt that they gave him was for him and Company. This Copper was put into a Warehouse belonging to *Sir Thomas*; and *John Robinson*, who was Brother to *George*, and Servant to *Sir Thomas*, kept the Key of it. Afterwards in the same Year *Sir Thomas* went into *Scotland*; whilst he was there *George* got the Key of the Warehouse from *John*, and pledged this Copper to the *Royal-Exchange-Assurance-Company* for two Thousand odd Hundred Pounds. The Money due upon this Pledge not being paid at the Time agreed upon, the Pledge was sold, and there remained in the Hands of the *Royal-Exchange-Assurance-Company* five Hundred-forty five Pounds, besides what satisfied their Debt and Charges.

About the Year — 800 l. *South-Sea* Annuities was bequeathed to *George* and *Ingram*, in Trust for *Anne Stretfield* for Life, the Remainder in Trust for *Sir Thomas*. *Anne Stretfield* died.

In 1731 *George* became a Bankrupt, and under that Commission the Assignees took the Possession of the Copper Works before mentioned.

In 1732 *Sir Thomas* applied to the Court by Petition, setting forth, "That for eight Years before he had been
"solely possessed of those Copper Works for his own Benefit, and that *George* had no Interest in them."
Whereupon he pray'd, That the Court would relieve him concerning the Seizure before mentioned. Upon that Petition Affidavits of several Witnesses were read, both on the Part of *Sir Thomas*, and likewise on the Part of the Assignees.

The Order on that Petition which was made was, that an Issue should be directed to try, whether Sir *Thomas* and *George* were Partners in these Works, or not. But that Issue never was tried.

The present Bill was brought by *Metcalf*, and others the Assignees under the Commission, against the *Royal-Exchange-Assurance-Company*, against Sir *Thomas*, *George* and *Ingram*, praying, that an Account might be taken between the Assignees and Sir *Thomas*, and that the 545 *l.* might be paid to the Plaintiffs, or at least placed to the Partnership Account, and that the Plaintiffs might be allowed to retain the Benefit of the 800 *l.* *South-Sea* Annuities, in Case Sir *Thomas* should appear to be indebted to them on the Balance of the Account. Sir *Thomas* in his Answer to this Bill swore, amongst other Things, that he could not set forth whether there was a Partnership between him and *George*, or not; the Question relating to that Matter arising from the Construction of certain Instruments in Writing.

There was another Bill brought by Sir *Thomas* against the *Royal-Exchange-Assurance-Company*, and the Persons whom they sold the Copper to, setting forth, that the Sale of the Copper was made by them in an unfair Manner, and praying Relief upon this Account.

Who shall
be said to be
a Partner in
carrying on
a Work.
From what
Time a
Partnership
shall be said
to com-
mence.

Lord Chancellor said, That there were two Questions proper for his Consideration; first, Whether Sir *Thomas Mackworth* and *George Robinson* were Partners? And secondly, Supposing they were Partners, what Share in the Trade they were each of them to be considered to have? With regard to the first of these Questions, his Lordship said it was extremely plain, that they were Partners. Whether they were so from the Year 1726, is not so clear. But that they were so from 1731 to the Time of the Bankruptcy of *George* is plain and manifest. The Agreement, which

was enter'd into between them in 1731, bears Date the 25th of *May* in that same Year. The Purport of the Agreement is, "I do promise to be accountable to Sir *Tho. Mackworth* in Profit and Risque for a Half in the Undertaking of and carrying on certain Copper-works, such Profit and Risque to be computed from the 25th of *March* last past. And I do agree to take such half Part of the Stock as the same has been estimated by the Servants of Sir *Tho. Mackworth*. Signed *George Robinson*." At the Bottom of this Paper-Writing there was another *Memorandum* to this Effect; "Whereas *George Robinson* has signed an Agreement to the Purport before-mentioned, I do hereby agree to the same. Signed *Tho. Mackworth*."

This Paper-writing purports, that Sir *Thomas* and *George* were to be Partners in Moieties. And after this Writing was signed, it appears that Receipts were given, wherein the Names of Sir *Thomas* and *George* were mentioned; and several Sums appeared to have been advanced by *George* in order to carry on his Trade. After this Writing was signed, *George* made a Pledge of the Copper in Question to the *Royal-Exchange-Assurance-Company*, for 2700*l.* and that Transaction shews likewise, that he acted in the Trade as a Partner. Nor does Sir *Thomas* take upon himself, by his Answer, to deny that he was a Partner. His being a Partner, or not, was a Matter of Fact which Sir *Thomas* could not but know. But instead of answering to the Fact, he chooses to say in this Manner, "That he could not set forth, whether there was a Partnership between him and *George*, or not, the Question relating to that Matter arising from the Construction of certain Instruments in Writing." The next Question is, what Share in the Trade they were each of them to be considered to have? And his Lordship's Opinion was, they were each of them intitled to a Moiety. The natural Import of the Agreement, which was enter'd into in *May* 1731, shews this. 'Tis a mutual Agreement between Sir *Thomas* and *George* to become Partners in Moieties. And consequently 'tis an Admission

The being a Partner, or not, is a Matter of Fact which he that is a Partner cannot but know.

What Share in a Partnership a Person shall be said to have.

What shall
be sufficient
Evidence of
a former
Partnership
being deter-
mined.

Where an
Issue shall
not be di-
rected to try
whether
there was a
Partnership
between two
Persons, or
not.

Where the
Court will
not direct
that a Fact
shall be tried
in any Issue,
tho' it was
before di-
rected, and
not tried.

mission under the Hand of Sir *Thomas*, that he had a Power to let *George* into a Moiety of this Trade. How the other Partners went out does not appear, but it is pretty plain, that there was some Alteration in the Interest of the Partners, which occasioned this new Agreement between Sir *Thomas* and *George*. After this Receipts were given in both their Names. If the other Persons had continued Partners at this Time, their Names would have been made use of in the Receipts as well as the Names of these Persons, or else the Receipts would have been given generally on the Behalf of one of them and Company. And what makes an End of this Matter is the Petition of Sir *Thomas* in 1732. By that Petition he expressly sets forth, that *George* and he were Partners, and that they had been so for eight Years together. However it has been urged, that this is not so clear a Point, but that it ought to be tried in an Issue, especially as there has been an Order already made for that Purpose. But his Lordship's Opinion was, that there was no Occasion to direct an Issue about it. He said, upon the Evidence laid before him, he had no Doubt concerning it. The Matter now appears more plain than it did in 1732. That order appears to have been made meerly on reading certain Affidavits. But now Exhibits are produced, which makes the Matter more clear. The Consequence is, that upon the original Bill the 545 *l.* must be directed to be brought into the Partnership Account. But as to the 800 *l. South-Sea* Annuities, there is no ground to allow the Plaintiffs to retain any Benefit of that, that being a Matter in its own Nature not proper for such a Retainer; for which Reason that Part of the Bill must be dismissed, but without Costs. With regard to the other Bill there is no Foundation for that, there being no Proof made, that the Sale was in an unfair Manner; that Bill therefore must be dismissed with Costs. And so his Lordship was pleased to decree accordingly.

Avery and Osborne.

February 25.

IN 1700 *Dudley Avery* made his Will, and thereby directed, that certain Lands of his should be sold for the Payment of his Debts, Funerals, &c. And after Payment of the same he gave the Surplus of his Estate both real and personal amongst the Children which he should have at the Time of his Death. He made *Margaret* his Wife, and *William Osborne* her Father, Executors of this Will. In 1706 the Testator died, leaving one Son named *James*, and one Daughter who afterwards died unmarried. *James* was at that Time an Infant of very tender Years, and *Margaret* and *William* took Possession of the real and personal Estate. In 1725, which was soon after the Time that *James* came of Age, he joined with *Margaret* in the Sale of Part of the real Estate; and after applying some Part of the Money to certain particular Purposes, it was agreed that 1700 *l.* the Remainder of the Money should be disposed of in the Manner following, namely, 1400 *l.* Part thereof, for the Benefit of *Margaret* for Life, and after her Decease for the Benefit of *James*; and as to the remaining 300 *l.* that it should be for the Benefit of *James* absolutely.

Soon after this, *George Osborne* the Brother of *Margaret* made a Purchase of certain Lands, and took the Conveyance in the Name of *Margaret* and *Norton*. In 1726 *Margaret* and *Norton* executed a Deed, whereby they declared, that the Trust of this Estate was for the Benefit of *George*. And by the same Deed *George* declared, that 1400 *l.* Part of the Consideration-money of that Purchase was the proper Money of *Margaret*, and charged the Estate by Way of Mortgage for the Payment of that Money to her. In 1728 *Margaret* was in an ill State of Health, and desired *George* to draw out a Sketch of the Effects which her Estate consisted of. In that Sketch he inserted one Item of about 100 *l.* that was due from him to her,

and took no Notice of his owing her any other Money. This Sketch of her Estate *Margaret* signed, and the same Year she died. Some Time before her Death she made her Will, and thereby she devised to *Norton* and *Sale* her real Estate, in Trust that the same should be sold, and that the Money arising therefrom should be invested in Securities for the Benefit of *James* for Life, the Remainder for the Benefit of his Children; and if he should have no Children, that then the same should go for the Benefit of her own Relations in such Manner as she thereby particularly mentioned. Of this Will *Norton*, *Sale* and *George* were made Executors. *Sale* died in the Life-time of *Margaret*, and *George* was the principal Person that intermeddled in the Management of her Estate.

After the Death of *Dudley* and *Margaret*, *James* received of *George* several Sums of Money at different Times, and at last entered into an Agreement with *George*, whereby he consented to accept of 100*l.* in Satisfaction of whatever he might be intitled to, either from the Estate of *Dudley* or of *Margaret*.

The present Bill was brought by *James* against *George* and others, praying, amongst other Things, an Account of the personal Estate of *Dudley* and of *Margaret*, and to have the Benefit of such Securities as he was intitled to.

To this Bill *George* put in his Answer, and thereby first insisted upon the Agreement which has been last mentioned, but in another Answer he waived it. He likewise put in a fourth Answer, and thereby, and not before, acknowledged the 1400*l.* secured upon his Estate for the Benefit of *Margaret*, and said, that he desired that his former Answers might be understood in this Sense, that in them he only set forth an Account of such Part of her Estate as had come to his Hands since the Time of her Death.

Lord Chancellor said, That the principal Question in the present Case was, Whether the 1400*l.* for which the Mortgage was made a Security by *George*, was to be considered as Part of the personal Estate of *Dudley*, or, Whether it was to be considered as Part of the personal Estate of *Margaret*? If it is to be considered as Part of the personal Estate of *Dudley*, the Plaintiff will be intitled to have a Decree for a Foreclosure against *George* upon the present Bill. And his Lordship said, he was extremely well satisfied, that this Sum of Money was to be considered as Part of the personal Estate of *Dudley*. This Sum of Money appears to have arisen from the Sale of his Estate. The Sale was made in 1725, and by the Deed which was executed for that Purpose it appears, that 1700*l.* Part of the Purchase Money, was to be applied in the Manner following; namely, 1400*l.* for the Benefit of *Margaret* for Life; and after her Decease for the Benefit of *James*; and as to the other 300*l.* that it was to be for the Benefit of *James* intirely. The Trustees in this Deed were *Sale* and *Norton*; *Sale* did not act in the Trust, and died in 1726. Afterwards the other Deed was made, by which it appears, that *George* had made a Purchase in the Names of *Margaret* and *Norton*, who were his Trustees, and by that Deed it is declared, that 1400*l.* Part of the Purchase Money, was the proper Money of *Margaret*, and Part of her own Estate, and the Lands which were so purchased were charged with that Sum by Way of Mortgage to her. The Sum being the same in one Deed, which is mentioned in the other, makes it probable that it was the same Money. But that which makes it clear, that this Money was not Part of the Estate of *Margaret* is, that in 1728 a short Time before her Death, a Sketch of her Estate was drawn out by *George*, which she herself signed; and in that Sketch *George* only charges himself with about 100*l.* as owing from him to her. The Consequence of these Things is, that a Decree of Foreclosure must be made against *George*. The remaining Question relates to Costs. And as far as the Costs have

Whose personal Estate a Sum of Money shall be consider'd to be Part of.

Upon what kind of Bill a Person will be intitled to pray a Decree for Foreclosing a Mortgage.

Where a Person shall be said to have shewn an Intention of concealing a Sum of Money.

When an Executor sets forth in his Answer an Account of a personal Estate, in what Sense that Answer shall be taken.

Where a Defendant shall pay Costs for endeavouring to conceal Part of a personal Estate.

Where a Defendant shall pay Costs for endeavouring to get the Plaintiff to come to an Agreement with him to

have been hitherto incur'd his Lordship's Opinion was, that *George* must pay them; he said it seemed to him, that there was an improper Intention in *George* to conceal this Sum of Money. In the Account of the Estate of *Margaret*, which he himself drew out, this Sum of Money is not mentioned, nor did he admit that there was any such Sum of Money till his fourth Answer; then it is that he makes this Discovery, and says, that he desires that his former Answers may be taken in this Sense, that he thereby only set out an Account of such Part of the Estate of *Margaret* as came to his Hands since her Decease. That is a forced Construction of the Sense of his former Answers; and it cannot be intended but that by those Answers he would have had it understood, that he set forth an Account of her whole Estate. This is one Reason for making him pay the Costs that have been hitherto incur'd. Another Reason is, that he got the Plaintiff to come into an Agreement to accept of 100*l.* together with the Monies that he had paid him, in Satisfaction of all his Interest in the Estate of *Dudley* and *Margaret*. This Agreement he insisted on by one of his Answers, but by another of them indeed he has thought proper to wave it. With regard to the subsequent Costs, those shall be reserved. And so his Lordship was pleased to decree accordingly.

to take a very small Sum of Money in Satisfaction of the Whole that was due to him.

February 26.

Bobeme and Porter.

BOHHEME was Master of a Vessel, and *Congreve* and *Barker* were Traders living at *Waterford* in *Ireland*. *Congreve* and *Barker* had Dealings with *Bobeme*, and *Bobeme* gave them a Promissory Note in a certain Sum of Money. This Note was indorsed to *Porter*, who was an Agent for them in *England*. But the Intent of this Indorsement merely was, that *Porter* might recover the Money which the Note was given for, and be accountable to them for it. *Porter* accordingly brought his Action upon the

the Note against *Boheme*; Bail was given in that Action, and he recovered Judgment in it.

The present Bill was brought by *Boheme* against *Porter*, *Congreve* and *Barker*, setting forth an Account that *Boheme* had with *Congreve* and *Barker*, and praying an Injunction to stay Execution upon this Judgment. *Porter* put in his Answer, and by that Answer the Fact appeared to be to the Purport before mentioned. *Congreve* and *Barker* were served in *Ireland* with Subpoenas to answer this Bill, but they refused to put in an Answer to it, and were served with an Attachment in *Ireland* upon that Account.

A Motion was now made, that the Order might be discharged, whereby an Injunction was granted till the coming in of the Answers of the several Defendants. On the other Hand it was pray'd, that, upon the Facts appearing as they did on the Answer which was come in, the Injunction might be continued to the Hearing.

Lord Chancellor said, It has been represented that the Writing which *Boheme* signed was a Bill of Exchange, and that it was play'd over into the Hands of one who was only a Factor or Agent for *Congreve* and *Barker*. If this had been so, there must have been a very strong Appearance of Equity to have intitled the Plaintiff to an Injunction; though in other Sort of Cases an Injunction would be continued to the Hearing without staying for the Answers of any such Defendants who appear to live beyond Sea; but in the present Case this is only a Promissory Note, and not a Bill of Exchange. It is a Note too given so long ago as 1736, which makes the Case less favourable than if the Note was given recently. This Note was sent over to *Porter* to be made use of by him merely as a Factor or Agent for *Congreve* and *Barker*. *Porter* must be consider'd as a

How far there must be a very strong Equity appearing to intitle the Plaintiff to an Injunction in case of a Bill of Exchange.

Where an Injunction shall be continued till the Hearing before the Answers of some of the Defendants come

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Trustee

in by reason that they live beyond Sea.

How far it will be an Ingredient for continuing an Injunction till the Hearing, that the Note in Question is a stale one.

Where a Person shall be considered as a Trustee for another of a Sum of Money recover'd upon a Note, notwithstanding he has given the other Credit for it in an Account.

Where an Injunction shall be continued till some of the Defendants put in their Answer, by reason that those Defendants that live in *Ireland*, have been serv'd with Process, and have not put in their Answer, and that Bail is given in the Action.

Where an Injunction shall not be continued till the Hearing, but only till the Answers of some of the Defendants come in, when they live in *Ireland*.

Trustee for them; for though it is true, that there was an open Account depending between him and them, and Credit was given for that Note, yet there was nothing done subsequent, by which that Note was consider'd as his own. The Persons really intitled to the Benefit of this Note live at *Waterford* in *Ireland*, a Place that is within the King's Dominions; they have been served with Subpœnas to answer this Bill, and with Attachments for not putting in their Answers, and Bail has been given in this Action. As this is so, it would be extremely hard that the Injunction should not at present be continued. However, his Lordship said, that he would not now continue it to the Hearing, but only till the Answers of *Congreve* and *Barker* should come in. And so his Lordship was pleased to order accordingly.

February 27.

Brown and How.

JOSEPH *Brown* made his Will, wherein was a Provision to the following Effect. The Will took Notice, "That an Estate had descended to the Wife of the Testator, and that that Estate was sold for 3700*l.* which Money was in the Hands of ——" The Will farther took Notice, "That it was agreed between *Joseph* and *Jane*, that this Money should be disposed of in such Manner as they should think proper; and that the Fee-simple Estate of *Joseph* should be disposed of in the like Manner." Accordingly the Will directed, and *Jane* approved of the same by her signing it, that 2000*l.* Part of the 3700*l.* and likewise all the Fee-simple Estate, should be to *How*, his Heirs, Executors and Administrators, in Trust for *Jane* for Life, the Remainder to *Edward* their Son and the Heirs of his Body, in case he should continue in his right Mind. But the Will took Notice, that *Edward* had at some Times committed Acts of Lunacy, and therefore the Will

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provi-

provided, that if he should be a Lunatick he should be allowed but 50 *l. per Ann.* besides an Estate which he would be intitled to as Remainder Man in Tail under the Settlement which was made upon the Marriage of *Joseph* and *Jane*; and that in that Case both the 2000*l.* and the Fee-simple Estate should go to their two Daughters.

In 1732 *Joseph* died, but some Time before his Death he committed *Edward* to the Custody of *Crossly*, under the Apprehension of his being a Lunatick; and in this Manner *Edward* continued at the Time of the Death of *Joseph*.

One of the Daughters mentioned in the Will of *Joseph* intermarried with *Zachary Baily*; the other of them intermarried with *Edward Baily*.

After the Death of *Joseph* *Jane* made her Will; she thereby took Notice that *Edward* was a Lunatick, and on that Account gave pretty large Legacies to *Zachary* and *Edward Baily*. In 1733 she died, and, during the Time that she survived *Joseph*, *Edward* continued in the Custody of *Crossly*.

After the Death of *Joseph* and *Jane*, *How* entered upon the Possession of the Fee-simple Estate; he continued *Edward* under the Custody of *Crossly* for six Months after the Death of *Jane*. *Crossly* then came and asked him for a Quarter's Pay for the Custody of *Edward*, but he told him, that he had no Money in his Hands arising from the Estate of *Joseph*. *Crossly* then asked him, Whether he might stop the Clothes of *Edward*? And he told him he might.

At the six Months End *Edward* was released out of *Crossly*'s Custody, under a *Homine replegiando*, and he was in a manner naked; nor was he indeed a Lunatick, but only committed Acts of Extravagancy when he was drunk. As soon as he was discharged out of Custody he applied to *How* for

for some Money, but was not able to get any of him, *How* telling him that the Tenants would pay him no Rent.

About this Time *How* made a Proposal to *Edward*, that he should agree that *How* should be allowed the Costs that he had been put to in relation to the Management of this Trust, and that he should put up a Monument for *Joseph*; but in case he should not agree to this, he told him he would take out a Commission of Lunacy against him. *Edward* did not agree to the Proposal, and thereupon *How* sued out such a Commission.

Edward then applied to the Tenants to get some Rent from them himself, but *Zachary* told the Tenants they must not pay the Rent to *Edward*, but must pay it to *How*, and *How* did receive 87 *l.* of them, which was Half a Year's Rent, and that was all that he could get.

In 1735 an Application was made to the Court to appoint a Receiver of this Estate; *How* opposed the Motion, but notwithstanding the Court directed that there should be one. Some short Time after another Application was made to the Court, namely, that they would supersede the Commission of Lunacy which *How* had taken out, and the Court accordingly did supersede it, chiefly for this Reason, because it was so long ago since it was taken out, and it had never been executed; however, the Court gave Liberty to *How* to sue out a new Commission, which *How* accordingly did, but did not yet execute that Commission.

The present Bill was brought by *Edward* against *How*, and likewise against *Zachary Baily* and his Wife, and against *Edward Baily* and his Wife, praying, amongst other Things, an Account of the Rents and Profits of the Estate of *Joseph* which *How* had received, and to have the Deeds relating to the Estate of *Joseph*, which *Zachary* had in his Custody, delivered up to the Plaintiff.

Lord Chancellor said, that the only Question of Difficulty in the present Case was, who should pay the Costs of this Suit; and his Lordship's Opinion was, that the Costs ought to be paid by *How* and *Zachary Baily*. He said his Reasons were these; 'tis indeed true, that with regard to the first Part of the Behaviour of *How*, in continuing *Edward* in the Custody of *Crossly*, there was nothing that was blameable, for he found him there by the Order both of the Father and the Mother. However after the Mother's Death, *Edward* was not in such a Condition as to be accounted a Lunatick; and accordingly he got himself discharged out of the Custody of *Crossly* by a *Homine Replegiando*. And what was the Behaviour of *How* on that Occasion? It is admitted by him, that tho' he gave Directions to *Crossly* for the continuing *Edward* under this Confinement, and tho' he was in Possession of the Fee-simple Estate of *Joseph*, and was intitled to receive the Interest of 2000 *l.* yet when *Crossly* applied to him only for a Quarter's Pay for the Custody of *Edward*, he refused to let him have it, under Pretence that he had not Money from the Estate in his Hands. And when *Crossly* asked him, whether he might detain the Clothes of *Edward* for the Pay, he consented to his doing it. This was really an Act of Cruelty. Consider then his Behaviour with regard to the Estate. It appears that after the Death of the Mother he took Possession at least of the Fee-simple Estate, which was devised by the Will of the Father. He has sworn indeed, that he did not take Possession of the settled Estate, and there is no sufficient Proof that he did. However, by the Proofs there is no Distinction made, to shew that he did not take Possession of that Estate likewise. It is said, that he never received but one Half Year's Rent, amounting to 87 *l.* and that in 1735 a Receiver was appointed. But what had he to do to retain the actual Possession of any Part of the Estate? There was no Colour for his doing it, unless *Edward* had been really a Lunatick.

Where a Trustee may continue a Person as a Lunatick under the Custody of another.

What shall be said to be an Act of Cruelty.

Where a Trustee has no Right to keep the actual Possession of an Estate belonging to a *Cestuy que Trust*.

Where a
Trustee will
be intitled to
keep the ac-
tual Posses-
sion of an
Estate, in
order to pay
the Profits of
it to another.

Indeed if *Edward* had appeared to be so, he would have been intitled to have received the Rents, in order to have paid them to the Persons to whom they were devised over under that Contingency. But nothing appears of his being actually a Lunatick. And now it must be taken that he was not, and only that he committed Acts of Extravagancy and Disorder when he was drunk. The Plaintiff therefore was intitled to have the Possession of his Estate. But instead of letting him have it, *How* thinks proper to keep him out of it; and insists, that he was the Person intitled to receive the Profits. This brings the Case home to *Zachary Baily*, and shews that both of them were Faulty in this Respect. *Zachary* so much interposed in this Affair, that he went to the Tenants, telling them that *How* ought to receive the Rents, and that they must pay them to *How*.

Where there
shall be said
to be a Con-
trivance in
two Persons
to keep Pos-
session of that
Estate.

His Lordship said, that he did not in this Case rely upon any particular Words in the Depositions, but from that which results from the Whole, by which it appears, that there was a Contrivance between *How* and *Zachary*, to keep the Possession of this Estate for the Benefit of the Children of the *Bailys*. Here is a Commission of Lunacy taken out, and never executed; the Tenants forbid to pay to the proper Person; and all this was for the Benefit of the Children of the *Bailys*, in Case it could appear that the Plaintiff was a Lunatick. Upon these Grounds his Lordship's Opinion was, that *How* and *Zachary* ought to pay the Costs of this Suit, as being the Authors of it. And so his Lordship was pleased to decree accordingly.

Where a
Trustee and
another shall
be decreed to
pay the Costs
of a Suit
chiefly for

endeavouring to keep the actual Possession of an Estate.

February 27.

Lowther and Carlton.

1693. 139.

IN 1693 a Settlement was made of a Church-Lease on the Marriage of ——— *Lowther* with ——— his Wife. By that Settlement the Husband and Wife were made Tenants for Life, with Remainder in Tail to the Issue Male

of their Bodies. ——— the present Plaintiff was the Issue Male of that Marriage. In 17— the Father sold this Leasehold Estate to the Marquis of *Wharton*, but he had no Notice of the Settlement. On the Death of the Marquis this Leasehold Estate came into the Hands of Lady *Jane Coke* and Lady *Lucy Morris*, who were his Daughters. They sold this Leasehold Estate to *Carlton*. *Carlton* at the Time of his Purchase had Notice of the Settlement. And for that Reason he took a Bond from Lady *Jane* and Lady *Lucy* to indemnify him for making this Purchase of them.

The present Bill was brought by ——— against *Carlton*, in order to have the Benefit of this Leasehold Estate, and to have an Account of the Rents and Profits from the Time of the Death of the Marquis.

To this Bill the Defendant pleaded his being a Purchaser for a valuable Consideration, and relied upon it, that, tho' he had Notice of the Settlement at the Time of his Purchase, yet that the Marquis had not, and that would be sufficient to protect him.

On the arguing of this Plea *Lord Chancellor* was of Opinion, that it ought to be allowed, by Reason that otherwise a Person might not have a Power of aliening an Estate to which he had got a bad Title. And the Plea was allowed accordingly.

A. buys an Estate and has no Notice of any prior Title at the Time he buys it. Afterwards

A. sells this Estate to *B.* *B.* at the Time of his Purchase has Notice of the prior Title; notwithstanding that, he shall be able to protect himself.

Some Time ago when this Cause came on to Hearing, it was objected, that Lady *Jane* and Lady *Lucy* ought to have been made Defendants. And the Court was of that Opinion, by Reason that the Account of Profits was insisted on then, even at the Bar, to be directed from the Death of the Marquis; and during Part of the Time between the Marquis's Death and the Filing of the Bill, Lady *Jane* and Lady *Lucy* were in Possession; accordingly the Bill was amended by making them Defendants.

When a Bill is brought for an Account of Rents and Profits, who must be made Defendants to that Bill.

To

To this amended Bill Lady *Jane* and Lady *Lucy* put in their Answers. And thereby they exprelly denied Notice in the Marquis, according to the best of their Belief, but admitted Notice in *Carlton*. The Plaintiff did not reply to the Answers of these two Defendants; and thereupon the Cause came now on in the Paper again.

Where a
Plaintiff
shall be ob-
lig'd to reply
to the An-
swers of cer-
tain of the
Defendants.

Upon the opening of this Cause it was objected on the Part of Lady *Jane* and Lady *Lucy*, that the Plaintiff ought to have replied to their Answers, and by that Means have given those Defendants an Opportunity of examining over again the Witnesses that had been already examined in this Cause, and of examining such new Witnesses as they should think proper.

In Answer to this Objection the Counsel for the Plaintiff said, that they waved at the Bar the demanding of any Account to be taken against the Representatives of the Marquis; and upon such Waver it was contended that the Bill might be directed to be dismissed as against them.

Lord Chancellor said his Opinion was, that the Objection which had been made was material. When the Cause was set down for Hearing before, he was of Opinion that Lady *Jane* and Lady *Lucy* were necessary to be made Parties. These Sort of Causes do not often come before the Court, where there is one Person, that is a Purchaser of an Estate for a valuable Consideration without Notice, and there is another Person that comes to be a subsequent Purchaser of the same Estate with Notice; and therefore there are not many Precedents in these Sort of Cases. The Plaintiff has now brought before the Court both the Representatives of the Marquis of *Wharton*, who was the original Purchaser, and the *puisne* Purchaser, who bought the Estate of them. He demands an Account of the Rents and Profits from the Time of the Death of the Marquis, during Part of which Time the Representatives of the Marquis were

in Possession. The Answer of these Representatives is not replied to. When the Bill was originally filed, the *puisne* Purchaser pleaded, that tho' he had Notice, yet the Marquis had not. As the Answer of the Representatives is not replied to, the Fact as to them is admitted. But as to *Carlton*, the Fact with regard to the Marquis's not having Notice, is not admitted. It has been said, that notwithstanding this, the Cause may properly go on as against *Carlton*, without replying to the Answers of the other Defendants, by Reason that the taking the Account as against the other Defendants is now waved at the Bar. And upon such Waver it has been urged, that the Bill may be order'd to be dismissed as against those Defendants. And his Lordship said he did not know but, if such Dismission was by the Consent of the Plaintiff, it might be properly enough directed. But if such Dismission be directed by Reason that the Answers of those Defendants are not replied to, it must be done on the Court's taking it for granted, that those Facts are true which are disputed in the Cause; and by this Means Decrees may be made contrary one to the other. Besides in a Court of Equity it may be necessary to make one Person a Defendant in a Cause, because another Defendant is intitled to have his Assistance; and this is one of those Cases. *Carlton* here is intitled to the Assistance of the Representatives of the Marquis. And if a Decree be made against him, he will have a Right to resort to them. And they are interested to be made Defendants to prevent a Decree being made against him. This Case is like those at Law of Warranties, Receipt, and praying in Aid. For these Reasons his Lordship said he would direct, that the Plaintiff should reply to the Answers of the Representatives of the Marquis, that they should be at Liberty to examine over again the Witnesses that have been already examined, and to examine such new Witnesses as they should think proper. And so his Lordship was pleased to decree accordingly.

Where the Court cannot direct that a Bill shall be dismissed, as against some of the Defendants, for Want of their Answers being replied to, and that the Cause shall proceed against others.

Where it is necessary to make one Person a Defendant to a Bill, by Reason that another Person is intitled to have his Assistance.

Where one Person, who is added a Defendant,

shall be intitled to re-examine the Witnesses that were examined before he was made a Defendant. Where a Person, who is added a Defendant, shall be allowed to examine such new Witnesses as he shall think fit.

March 2.

Edmonds and Edmonds.

IN 1692, on the Marriage of *Thomas Edmonds* with *Jane Folechamp*, a Settlement was made, and thereby an Estate was limited to *Thomas* for Life, the Remainder to Trustees for a Term of Years, for the raising 3000 *l.* in Case there should be Two or more younger Children, with Remainder to their first and other Sons in Tail Male. The Issue of this Marriage were *Thomas*, *Margaret* and *Catharine*. Some Time after *Thomas* the younger came of Age, he and his Father joined in altering the Settlement, and thereby *Thomas* the Younger was only made Tenant for Life, with a Power to make a Jointure, the Remainder to his first and other Sons in Tail Male. And by this second Settlement it was declared, that the Estate should only be chargeable with 2000 *l.* for the Benefit of younger Children, and that the other 1000 *l.* should be subject to the Disposal of *Thomas* the Elder. *Margaret* and *Catharine* were not Parties to this second Settlement. *Thomas* the Elder died. Afterwards *Margaret* died, and on her Death *Thomas* the Younger took out Letters of Administration to her. *Catharine* intermarried with *Dawson*; *Thomas* the Younger purchased of *Catharine* the Share in her Portion due to her, and likewise the distributary Share which she was intitled to in the Portion of *Margaret*. He likewise obtained from *Jane* an Assignment of the distributary Share in the Portion of *Margaret*, which was due to her; he had Issue one Son named *Francis*.

When a Son
joins with his
Father in al-
tering a Set-
tlement of
an Estate,
where he
may claim

The present Bill was brought by him against *Francis*, praying to have the 3000 *l.* raised, which was charged on the Estate by the first Settlement. The principal Objection which was made against it was, that he had joined in making the second Settlement, and thereby had concluded himself

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the Benefit of Charges under the former Settlement, contrary to the subsequent one.

himself from charging the Estate with younger Childrens Portions in any greater Sum than was thereby provided for that Purpose.

Lord Chancellor said his Opinion was, That the 3000*l.* ought to be raised for the Benefit of the Plaintiff. He said, had *Margaret* been living, and had not *Catharine* sold the Benefit of her Portion, 'tis clear that they would have been intitled to have had the whole 3000*l.* raised, and the Plaintiff by standing in their Place shall have the same Privilege. And so his Lordship was pleased to decree accordingly.

Where a Person, who stands in the Place of others by Assignment and Representation, shall have the same Benefit as those others would have had, though it be contrary to his own Deed.

Stockdale and The South-Sea Company. March 5.

IN 1720 *Martha Gravestock* was possessed of a Long Annuity of 40*l.* per Ann. payable out of the *Exchequer*. On the 20th of *May* in that same Year she subscribed the same into the Books of the *South-Sea Company*. *Irons* was her Broker who transacted the Affair on that Occasion. It appeared by an Entry in his Book, that on the 23d of that same Month he sold for her the Annuity, which was so subscribed, to *Richard Warren* at thirty Years Purchase and a Half, amounting to 1226*l.* 11*s.* 10*d.* It appeared by another Entry in his Book, dated the Day following, that he laid out 1233*l.* 12*s.* 10*d.* in the Purchase of *East-India* Bonds, and other publick Securities, for the Benefit of *Martha Gravestock*.

In the *December* following the *South-Sea Company* placed to the Credit of *Martha* in their Books the Long Annuity before mentioned. From that Time to the present one no Body had ever received of the Company any Dividends or other Advantage arising from the *South-Sea* Stock that came in the Room of the Long Annuities. One of the Witnesses swore, "That he had been informed, and
"believed

“ believed that *Richard Warren* went to the *East-Indies*, or
 “ to the *West-Indies* in the Year 1720, and that he had
 “ never been heard of since.” Others of the Witnesses
 swore, “ That they had heard *Martha Gravestock* say, that
 “ *Irons* told her, that her Long Annuity was lost in the
 “ general Confusion which was in 1720, and that she often
 “ declared, that she was a Sufferer by the *South-Sea Com-*
 “ *pany.*” On the other Hand it was sworn by *Greaves*,
 who was a Clerk in the *Exchequer Office*, “ That he went
 “ to her in *August* 1735, and made an Inquiry of her in
 “ relation to her Long Annuity, and that she told him it
 “ was subscribed into the *South-Sea Company* in 1720,
 “ and that she had sold it out to Advantage.”

In the same Year *Martha* died, leaving a Will, whereby
 she appointed *Stockdale* and *Irons* her Executors and Residu-
 ary Legatees. After her Death *Rigdel*, who was a Clerk
 in the *South-Sea Company*, gave Intelligence to *Stockdale*
 that *Martha* was intitled at the Time of her Death to the
South-Sea Stock that came in the Place of the Long Annui-
 ty, and thereupon *Stockdale* and *Irons* enter'd into a Bond
 to *Rigdel* to pay him 25 *l. per Cent.* for every 100 *l. South-*
Sea Stock that should appear to be due to *Martha* at the
 Time of her Death. After this, and in the same Year,
Stockdale and *Irons* joined in a Petition to the Directors of
 the *South-Sea Company*, setting forth, “ That there was
 “ such Stock in the Place of the Long Annuity due to
 “ *Martha* at the Time of her Death, with many Years Di-
 “ vidends in Arrear upon it, and praying, that they might
 “ have the Benefit of it.”

This Petition was referr'd by the Directors to their Com-
 mittee of Law-Suits. When the Petition came to be heard
 before the Committee, *Irons* discovered to them the Entries
 in his Book before mentioned, and thereupon they refused
 to give the Petitioners any Redress. After this *Irons* sold
 to *Stockdale* the Share which he could be intitled to in the
 Stock for fifty Guineas.

In 1737 *Irons* died, and *Rigdel* died likewise. After their Deaths the present Bill was brought by *Stockdale* against the *South-Sea* Company, and against the Representatives of *Rigdel*, praying, that the Plaintiff might have the Benefit of such Share in the Stock which was standing in the Name of *Martha*, as he was intitled to. To this Bill *Warren* was not made a Party, being not to be found; however, the Plaintiff offer'd to indemnify the *South-Sea* Company against any Demand that *Warren* might have upon them on this Account.

Lord Chancellor said, that when this Cause was first of all open'd it seem'd to him to be a pretty strong Case in favour of the Plaintiff, but now he thought it extremely plain that the Plaintiff was not intitled to any Relief. 'Tis indeed true, that *Martha Gravestock* was originally the Proprietor of the Long Annuity; and it is true likewise, that on the 10th of May 1720 *Irons*, with her Consent, subscribed this Long Annuity into the *South-Sea* Company. But it is insisted on the Part of the *South-Sea* Company, that on the 23d of that same Instant *Irons*, with her Consent, sold this Long Annuity to *Warren*; in support of this an Entry is produced in the Book of *Irons*, who was a Broker, whereby it appears, that upon that 23d Day of May this Long Annuity was sold to *Richard Warren* for 1226 *l.* 11 *s.* 10 *d.* And in the same Book another Entry is produced of the Day following, whereby it appears, that *Irons* laid out 1233 *l.* 12 *s.* 10 *d.* for the Benefit of *Martha* in the Purchase of *East-India* Bonds, and other publick Securities. This Sum amounted to about 7 *l.* more than what it appears the Long Annuity was sold for, so that it is probable that 7 *l.* was the proper Money of *Martha*, which was added to the former Sum. Thus the Transaction appears from the Evidence of the Book of *Irons*; and it is probable that *Martha* knew that her Long Annuity was in this Manner disposed of, because she made *Irons* one of her Executors, and one of her residuary Legatees. And what

Where a Person shall be taken to have sold *South-Sea* Stock which he was intitled to.

Publick
Companies
are only to
consider the
Person in
whose Name
the Stock is
standing, un-
less the Trust
of that Stock
is declared in
their Books.
How far by
the Stat. of 6
G. 1. 4. the
South-Sea
Company are
to be confi-
der'd Pur-
chasers of
Annuities,
and other
Securities,
that were
subscrib'd
into their
Companies.

confirms this is, that *Greaves*, who was a Clerk in the *Exchequer* Office swore, " That in *August* 1735 he went
" to *Martha*, and talked with her about her Long Annu-
" ty, and she told him, that she had subscribed it into the
" *South-Sea* Company in 1720, and had sold it to Advan-
" tage." Thus the Matter stands with regard to the Me-
rits of the Case, and shews, that the Plaintiff is merely a
Trustee for *Warren*. However it is very certain, that
these great Companies are only to consider the Person in
whose Name the Stock is standing, unless the Trust of
that Stock is declared in their Books. But the present Case
is a very different one from that, because here by the Statute
of 6 Geo. 1. 4. the *South-Sea* Company were Purchasers of
Annuities, and other Securities, that were subscribed into
their Company. The Subscription here was opened on the
10th of *May* 1720, the Annuity subscribed was then in
the Name of *Martha*; and the fourteenth Section of that Act
directs, " That such Persons or Corporations respectively,
" as by the said Books, Registers, or Entries, shall appear
" to be the Persons or Corporations intitled to any such
" Annuities or Debts as are last mentioned, at the Time,
" or respective times, when the same shall be taken in by
" such Purchase, Subscription, or paying off as aforesaid,
" pursuant to this Act, shall be deemed and adjudged the
" true and lawful Proprietors thereof respectively; and
" that the Auditor of the Receipt of the *Exchequer*, and
" each Comptroller in those particular Offices respective-
" ly, shall on or before the 13th Day of *May* 1720, trans-
" mit, or cause to be transmitted in Writing under
" their respective Hands, to the Managers and Directors
" to be constituted in pursuance of this Act, or such of
" them as aforesaid, fair Schedules or Lists expressing there-
" in every such Annuity and Debt, and the present Pro-
" prietors thereof, and the particular Duties, Provisions
" or Funds charged therewith, as they shall appear by the
" said Books, Registers or Entries, at the Time of trans-
" mitting such Schedules; and shall afterwards, from
" Time to Time, daily certify to the said Managers
" and

“ and Directors so to be constituted, or such of them as
 “ aforesaid, all Alterations or Additions which ought to
 “ be made in or to the said Schedules by any subsequent
 “ Assignments, Bills or Titles, which shall be brought
 “ to the said Receipt, or other Offices respectively, to
 “ be enter’d, after the transmitting of the said Sche-
 “ dules until the said first Day of *March* 1721.” The
 Consequence of this is, that as *Warren* purchased this
 Long Annuity on the 23d of *May*, that should have been
 transmitted in their Books, and placed to his Account;
 the not doing it was through Mistake or Ignorance in the
 Company; and was the Court to Order the Company
 to pay this Money to the Plaintiff, it would be for the
 Court to order the Company to pursue their Mistake,
 which the Court ought not to do. It has been said, that
 the Plaintiff in this Case offers to give the Company Secu-
 rity; and if the Company thought proper to accept it, this
 Court would have no Objection to it. But that is rather a
 Matter proper for a private Agreement between the Plain-
 tiff and the Company, than for this Court to decree. The
 remaining Question to be considered relates to the Costs of
 this Suit; and with regard to the *South-Sea* Company, the
 Bill ought to be dismissed with Costs as against them.
 The Demand which the Plaintiff makes upon them is clear-
 ly contrary to the Conscience and Knowledge of *Irons*, and
 the Plaintiff ought to be affected by that, by reason that
 he bought of *Irons* his Moiety for so small a Sum as fifty
 Guineas, and that too not to be paid till after this Suit
 should be determined. With regard to the other Defen-
 dant the Bill must be dismissed generally. And so his
 Lordship was pleased to decree accordingly.

Whom the Court will direct that *South-Sea* Stock shall be paid to. Where a Bill shall be dismissed with Costs as against the *South-Sea* Company. Where a Person shall be affected by the Notice of him whom he Purchases under, by reason of the Smallness of the Purchase Money. How far a Person shall pay Costs for bringing a Bill for a Sum of Money. Right to it.

ney, when he must have known that he had no

March 6.

Gyles and Wilcox.

IN July 1736 *The History of the Pleas of the Crown* was published by Gyles and others, who were the Proprietors of that Copy. In the August following Wilcox and Curl contracted with Barlow to pay him 60*l.* for making an Abridgment of that Book; accordingly Barlow undertook to do the same, but in executing it it was doubtful whether the Book that he compiled was an Abridgment of the other, or whether it was only the same Book shortened and made less. Several Sheets of this last mentioned Book were printed, and thereupon Gyles and others, who were the Proprietors of the Copy before mentioned, brought their present Bill against Wilcox and Barlow, praying to have an Injunction, to restrain them from printing the Work that was intended as an Abridgment of the other.

Lord Chancellor said, that this Bill is founded upon the Statute of the 8th of Queen Anne; and though it has been said by the Counsel for Wilcox, that this Statute tends to the creating of a Monopoly, yet his Lordship declar'd he could not be of that Opinion. It is an Act made for the Encouragement of Learning, and is useful to that End.

The Stat. of 8 A. cannot be said to tend to a Monopoly.
The Stat. of 8 A. shall be said to be made for the publick Benefit and Advantage, by reason that it tends to the Advancement of Learning.
This Statute must not be construed strictly, but according to the Intention of the Legislature.

This shews that the Act is for the publick Benefit and Advantage, and therefore the Act is not to be construed strictly, but according to the Intention of the Legislature; however that Intention must be formed from the Words of the Statute. The Words in the Statute all along are *any such Book or Books*; and therefore, when Complaints of this Sort have come before the Court, the single Question has constantly been, Whether the second Book has been the same

When Complaints have been made of a Book's being printed contrary to the Statute, the only Question has been, Whether it is the same Book with the former?

same Book with the former? And where the second Book has no otherwise differ'd from the former than by reducing or shortning the Stile, or by leaving out some of the Words of the first Book, the second Book has been construed the same with the former. But where the second Book has been an Abridgment of the former, it has been understood not to be the same Book, and therefore to be out of the Act. Within the former Part of this Distinction the Case fell which has been cited by the Counsel for the Plaintiff, determined on a Motion the 9th of May last; there a Book had been published, containing *The History of the Life of the late Czar of Muscovy*. The second Book that was published no otherwise varied from the first, than by leaving out certain Parts of the former, and only by that Means shortning it, and the Court was of Opinion, that an Injunction ought to be granted to restrain the Printing of that second Book. To make an Abridgment is a Work of Judgment; and the Question in the present Case is, Whether the Book that is now before the Court is an Abridgment or not? It has been rightly said by the Counsel for *Wilcox*, that this Court is now to make the same Construction of the Act, as if *The History of the Pleas of the Crown* were entered in the Book of the *Stationers Company*, and an Action at Law brought for the Penalty for Printing the second Book. Whether the second Book is the same Book with the former is a Matter of Fact, and a Fact of Difficulty to be determined. It is hard to say in what Manner the Court ought to determine this Fact; and his Lordship said he could not see how it could be determined but by reading both the Books over, and that would be hardly proper for him to do. It has been hinted, that as this is a Matter of Fact the Court may send it to be tried before a Jury, but the Court is not confined to send all Matters of Fact to be tried in that Way. Where the Matter indeed consists of a single Fact, or of two or

Where the second Book has no otherwise differed from the former than by reducing or shortning the Stile, or by leaving out some of the Words of the first Book, the 2d Book has been construed to be the same Book with the former; but where the 2d Book has been an Abridgment of the former, it has been understood not to be the same Book.

Where one Book shall be said to be an Abridgment of another.

Where it is necessary that a Book should be entered in the Book of the *Stationers Company*.

Whether the 2d Book is the same Book with the former is a Matter of Fact.

In what Manner the Court will determine the Question, Whether the 2d Book was the same Book with the former.

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Where a Matter indeed consists of a single Fact, or indeed of two or three Facts, the Court does take that Method to determine them by directing an Issue; but where the Facts are of an extensive Nature, as Matters of Accounts are, or the like, the Court does not take that Method to determine them.

Where the Court will send it to a Master to inquire, Whether one Book is a fair Abridgment of another, or only a colourable one.

Where the Court will direct that the Master shall be attended by two Persons of the Profession of the Law, in order to assist him in determining whether one Book is a fair Abridgment of another, or whether it is only a colourable one.

three Facts, the Court does take that Method to determine them, but where the Facts are of an extensive Nature, as Matters of Account, or the like, the Court does not take that Method to determine them, but directs them to be inquired of before the Master. His Lordship said that he did not see what other Method he could take to determine the present Question, than by directing an Inquiry before the Master, to see whether the Book in Question was a fair Abridgment or only a colourable one. And in order that the Master may better determine this Matter, his Lordship said that he did not see but he ought to direct, that the Master should be attended by two Persons skilled in the Profession of the Law, to assist him. And Directions of this Sort have been made in Mathematical and Algebraical Inquiries. But his Lordship said he should choose, that two Persons should be agreed upon by Consent of both Parties to attend the Master in this Matter, rather than that the Court should appoint them; for which Reason his Lordship said, he would direct that the Matter should stand over for a Week, to see whether the Parties in the mean Time might not come into a Consent of this Sort amongst themselves, and if they should not, he would then give a Direction about it himself. And so his Lordship was pleased to order accordingly. *Vide the next Case.*

When a Question relating to a Mathematical Matter has been sent to be inquired into by the Master. Where the Court will direct, that two Persons skill'd in Mathematical Matters shall attend the Master in order to assist him in the Inquiry.

March 13.

Gyles and Wilcox.

Ante 368.

THIS Matter now coming on again the Parties said, that they had each of them fix'd upon one Counsel.

Lord Chancellor said, that the best Way was to leave all Matters in Difference to the Arbitration of those two Counsel, and if they should not be able to make an Award, that then they should have Liberty to choose an Umpire. Accordingly the same was agreed to.

*Lamplugh and Hebden.**March 6.*

ON the Marriage of *Lamplugh* with ——— a Settlement was made of certain Lands in strict Settlement. But there was a Proviso in that Deed, that *Lamplugh* should have a Power of disposing of those Lands in such Manner as he should think proper, in case he should make a Settlement of other Lands of the Value of 100 *l. per Ann.* to the same Uses. By this Marriage there was Issue one Daughter. *Hebden* entered into Articles with *Lamplugh* for purchasing of him the Lands that were originally contained in this Settlement. At the Time of his Contract with *Lamplugh* he had no Notice of this Settlement; and thereupon he entered upon the Possession, and dug Brick-earth in order to build upon it. But before the Time for compleating the Payment of his Purchase-money, he got Intelligence of the Settlement, and thereupon he refused paying the Residue of his Money.

The present Bill was brought by *Lamplugh* against *Hebden*, in order to compel him to compleat his Contract. And the Bill suggested, that at the Time this Contract was entered into between *Lamplugh* and *Hebden*, *Lamplugh* had settled other Lands of the Value of 100 *l. per Ann.* to the same Uses. At the Hearing of this Cause it was objected on the Part of the Defendant, that the Plaintiff's Wife and his Daughter were not made Parties to this Suit.

On the other Hand it was insisted, that in Bills of this Sort the usual Method is for the Court to direct, that the Master inquire, whether the Plaintiff can make a good Title, and therefore that it will be sufficient to bring the Wife and the Daughter before the Master, in order that they may lay before him any Objections to shew that the Estate, which was contained in the second Settlement, was not of the Value of 100 *l. per Ann.*

Lord

A Husband reserves to himself a Power by his Marriage-Settlement, to sell the Estate which is settled, provided he settles other Lands of a certain Value to the same Uses. He does settle other Lands of that Value accordingly, and then sells the Lands which were originally purchased. The Husband brings a Bill against the Purchaser in order to compel him to complete his Purchase. The Wife and Children must be made Defendants to this Bill.

When a Bill is brought to compel the Defendant to complete the Payment of his Purchase-money for an Estate, wherein the only Question will be, whether the Plaintiff can make a good Title, where it will not be sufficient to bring the Wife and Children before the Master.

Where it is not proper to make Persons Defendants to a Bill, merely that they may litigate their own Title.

Lord Chancellor said his Opinion was, that the Wife and the Daughter ought to be made Parties to this Suit. He said, that here is a Man contracting for the Purchase of an Estate, which is contained in a Marriage-Settlement; in that Settlement there is a *Proviso*, that the Husband shall have it in his Power to dispose of the Estate that is settled, in Case he shall settle other Lands of the Value of 100 *l. per Ann.* to the same Uses. It is contended on the Part of the Plaintiff, that he did settle other Lands of that Value, and therefore that he was well intitled to sell the Lands, which were originally contained in the Settlement, to the Defendant. The Bill is brought in order to compel the Defendant to perform the Contract for the Purchase of this Estate that he made with the Plaintiff. In order to have a Decree for such Performance, it will be incumbent on the Plaintiff to make out that he has effectually settled, other Lands of the Value of 100 *l. per Ann.* to the same Uses; now the Proof that the Plaintiff may make of this in the present Cause might be sufficient to intitle him to such Decree, in Case that the Wife and Child were not made Parties, and yet it might not be sufficient in Case that they were. And were they not to be Parties, the Wife and Child might bring a new Bill, and over-turn the Title of the Defendant. And notwithstanding they should be brought before the Master, nothing that is there done will conclude them. Therefore this is such a Case, that the Plaintiff cannot be said to make out a good Title to the Estate in Question, unless the Wife and Child were made Parties. It has been said, that it is not proper to make Persons Parties to a Bill, merely to the End that they may litigate their own Title. And it is indeed true, if there was no other End of making the Wife and the Daughter Parties, that it would not be right that they should be made so. But there is another End of making them

them Parties. The Bill may be amended by praying, that they may join in the Conveyance to the Purchaser, and a Decree may be made for that Purpose. And so his Lordship was pleased to decree accordingly.

Where a Decree may be made against a Wife and Children to compel them to join

in a Conveyance, tho' they were no Parties to the Contract.

Allen and Crobcraft.

March 7.

Thomas Allen became indebted to Crobcraft in several Sums of Money. And Crobcraft persuaded Joseph Allen, the Brother of Thomas, to join with Thomas, as Surety for him, in giving a Bond for this Money. At the same Time Crobcraft gave a Note to Joseph, whereby he promised him, that he would not take Advantage of the Bond against him, and told him that the Design of his persuading him to enter into this Bond meerly was, that Thomas might be more likely to pay the Money when he knew that his Brother was bound for it. By the Bond the Money was made payable at different Instalments. However Crobcraft thought proper to put the Bond in Suit against Joseph, and obtained Judgment upon it.

The present Bill was brought by Joseph against Crobcraft, praying to be relieved against this Judgment.

To this Bill Crobcraft put in his Answer, and thereby admitted the Facts before set forth, but swore likewise that there was a Mistake in the Manner of Drawing the Note, for that as he swore the Intention of the Parties was only, that Joseph should not be obliged to pay the Money till all the Days of the several Instalments were over. It was now moved, that the Injunction might be continued till the Hearing.

Lord Chancellor said his Opinion was, that the Injunction ought to be so continued. He said it was the general Rule of the Court, that where a plain Equity set forth by the Bill is admitted by the Answer, but endeavoured to be avoided by another Fact, the Injunction shall always be continued till the Hearing. And so his Lordship was pleased to decree accordingly.

It is the general Rule of the Court, that where a plain Equity set forth by the Bill is admitted by the Answer, but endeavoured to be avoided by another Fact, the Injunction shall always be continued till the Hearing.

March 7.

Ex parte —

A Messenger belonging to a Commission of Bankruptcy had been guilty of a Contempt of the Court. Thereupon it was now moved, that he might be committed a close Prisoner to the *Fleet*.

When a Person is committed for a Contempt of the Court, 'tis the Duty of the Gaoler to keep him a close Prisoner.

Lord Chancellor said his Opinion was, that at present he could only order him to be committed to the *Fleet* generally. He said it was very true, that when a Person is committed for a Contempt of the Court, 'tis the Duty of the Gaoler to keep him a close Prisoner. But the Court will not make an Order that he be kept a close Prisoner, till the Gaoler has been in Default in letting him have the Benefit of the Rules.

When the Court commits a Man for Contempt, they will not direct that he shall be kept a close Prisoner till the Gaoler has been in Default in letting him have the Benefit of the Rules.

March 9.

Gratwick and Juniper.

Where a former Bond shall be understood to have been included in a subsequent one.

Samuel Juniper the Father, and *William Moor* were Dealers together in Timber. They bought a Parcel of Timber of *Henshaw*, converted it into Plank, and when it

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was

was so converted, sold it to *Brigs*. On the 4th of *August* 1718, *Brigs* entered into a Bond to *Samuel* for 180 *l.* and *Gratwick* joined with him as his Security. Soon after this Bond was given, 10 *l.* was paid by *Brigs* to *Samuel* on the Account of this Bond, and an Indorsement made on it, testifying the Receipt of this Sum. On the 5th of *February* 1719, another Bond was entered into by *Brigs* and *Gratwick*, as his Surety, to *Moor* and *Samuel* for 176 *l.* In 1726 *Samuel* died, leaving *Samuel* his Son his Executor. In 1732 *Brigs* died, and it appeared that both *Brigs* and *Samuel* the Elder were neither of them Persons of very good Circumstances. The Money due upon the second Bond was paid off and discharged. *Samuel* the Younger was talked with about the first Bond, and he only insisted at one Time, that there was 40 *l.* due upon it, at another Time that there was about 5 *l.* and at a Third that there was about 8 *l.* due upon it. After this an Action upon the first Bond was brought by *Samuel* the Younger against *Gratwick*; *Gratwick* pleaded *Non est factum*, and *Samuel* the Younger obtained a Verdict, and afterwards signed his Judgment.

The present Bill was brought by *Gratwick* against *Samuel* the Younger, praying to be relieved against this Judgment.

Lord Chancellor said his Opinion was, that he must direct an Issue, to try whether the Money due upon the first Bond was included in the second Bond, or not. He said, it would be very difficult to find out by what Kind of Plea *Gratwick* could have availed himself at Law. The only one that can be thought of any Ways likely for that Purpose, is Payment of Principal, Interest and Costs, under the Statute for the Amendment of the Law. But he must have been gone upon that Plea, in Case the Fact which is now insisted on was true, namely, that the second Bond was given in Discharge and Satisfaction of the first. *Grat-*

Where an Issue shall be directed to try whether the Money due upon the first Bond was included in the second Bond, or not.

Where a Defendant cannot be allowed to plead Payment of Principal, Interest and

Costs, within the Statute of 4 *Anne*.

Where it is
necessary for
a Person to
come into a
Court of E-
quity in or-
der to be re-
lieved against
a Bond.

Where a
Bond shall
be taken to
have been
satisfied.

Upon what
Account a
Bond shall
be under-

stood to have been given.

wick therefore could hardly have availed himself by any Plea at Law. And for this Reason it is, that he comes in to this Court, insisting upon it, that the first Bond was satisfied by Means of the second being accepted in Discharge of it. It is pretty extraordinary to conceive that the first Bond should be now standing out. Most of the Witnesses agree, that neither *Brigs* nor *Samuel* the Elder were Persons in very good Circumstances. This Bond was given in 1718, and the Action was not brought upon it till 1737. No one Demand appears to have been made for the Payment of the Money mentioned in that Bond, during all that Time, and yet *Samuel* the Elder lived till 1728. On his Death this Bond comes into the Hands of *Samuel* the Younger. 'Tis indeed true, that this is not such a Length of Time as that *Gratwick* could have pleaded *Solvit ad diem*. For in order to have intitled him to that Plea, twenty Years must have been compleatly run out. However the great Length of Time is a material Ingredient, with other Circumstances, to presume that this Bond was in some Way or other satisfied. When *Samuel* the Younger was talked to upon this Subject, he only insisted at one Time, that there was about 40 *l.* due upon it, at another Time, that there was about 5 *l.* and at a third Time, that there was about 6 *l.* due upon it. These were Admissions that the greatest Part of this Bond was satisfied, and were inconsistent with the Pretence now set up, that there never was but 10 *l.* paid on Account of that Bond. 'Tis an odd Thing too to conceive that a second Bond should be discharged, and yet that a former Bond should be standing out. It is pretty remarkable likewise, that it is admitted of all Hands, that about the Year 1717 or 1718, Timber was bought of *Henshaw* by *Moor* and *Samuel* the Elder. 'Tis agreed, that the Timber was sold soon after to *Brigs*. And yet according to the Pretence set up by the Defendant, here is no Security given by *Brigs* to *Moor* and *Samuel* the Elder till 1719. What could be done during all that Space of Time? The Nature of the Thing

Thing speaks it, that the first Bond must have been given on Account of the Contract that *Brigs* entered into with *Moor* and *Samuel* the Elder, for Timber, that the Name of *Moor* was omitted to be inserted as one of the Obligees in that Bond; and that that gave Occasion to *Moor*'s insisting upon it, that the second Bond should be given wherein his Name was inserted. It is admitted too by the Answer of the Defendant, that in subsequent Accounts stated between *Brigs* and *Samuel* the Elder, no Notice is taken of there having been any Bond entered into by *Brigs* to *Samuel* the Elder on his proper Account; and therefore it is extremely probable, that the first Bond was not given on his own Account, and that it was included in the Second. And so his Lordship was pleased to decree accordingly.

Upon what Account a second Bond shall be understood to have been given.

Vernon and Blackerby.

March 10.

IN February 1730 Dr. *Vernon* was admitted, instituted and inducted to the Church of *St. George's Bloomsbury*. This was a new erected Church by the Statute of 3 Geo. 2. and the Sum of 3000 *l.* was allotted by the same Statute to be laid out in the Purchase of Lands for the Benefit of the Rector of this Church for the Time being. And till such Purchase could be made, it was directed by the Act, that the same should be laid out in the Purchase of *South-Sea* Annuities; and that the Rector for the Time being should be intitled to the Dividends arising from the same, to commence from *Midsummer* 1730. This Church was not consecrated till the *January* following, and as has been said, Dr. *Vernon* was not inducted to it till the *February* before-mentioned. Soon after he was inducted, Mr. *Blackerby*, who was Treasurer of the Money allotted for the Building the Fifty New Churches, and of which this Church was appointed to be one, paid him the Dividend of the Sum of 3000 *l.* from the *Michaelmas* 1730, but refused to pay him the Dividend of it which accrued from the *Midsummer* before. In 1733

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Dr.

Dr. *Vernon* entered into a Contract for the Purchasing an Estate in *Kent* for the Sum of — Part of the 3000*l.* before mentioned. In the *August* in that same Year, on the Application of Dr. *Vernon*, the Commissioners of the Fifty new Churches granted a Warrant upon the Treasurer to sell out so much Money, Part of the *South-Sea* Annuities. On the 5th of *September* following such Part of the *South-Sea* Annuities was sold out, but the Money was not invested in the Purchase till the *November* following; and the Remaining Part of the *South-Sea* Annuities was not invested in the Purchase of Lands at all.

The present Bill was brought by Dr. *Vernon* against Mr. *Blackerby*, praying to have the Dividend of the *South-Sea* Annuities which accru'd between *Midsummer* 1730 and the *Michaelmas* following; to have an Allowance of such Part of the Dividend as had accrued from *Lady-Day* 1733 to the 5th of *September* in that same Year; and likewise, that the remaining Part of the *South-Sea* Annuities, which had not already been laid out in the Purchase of Lands, might now be laid out in such Purchase.

Where a Bill cannot be brought against the Treasurer alone, without at the same Time making the Commissioners Defendants.

Lord Chancellor said, That the Application which was now made before him was a most extraordinary one in its Nature, and contrary to the Intention of the Statute upon which it is founded. He said, that this is a Bill brought by Dr. *Vernon* against Mr. *Blackerby* alone, who is nothing but an Officer and Servant under the Commissioners relating to the Building of the Fifty new Churches; he is bound to act according to their Orders, and in pursuance of their Directions, yet he alone is brought before the Court without the Commissioners themselves. This Objection, his Lordship said, appeared to him in a very strong Light, when it was first made, for want of Parties; but he was willing at that Time to go into the Case at large. There are several Parts of Relief which the Plaintiff insists on in the present Case; one of them is the Interest of 3000*l.* from *Midsummer* 1730 to the *Michaelmas* following; the next

next is the Interest on 3020*l.* from *Lady-Day* 1733 to the 5th of *September* following; the last is, that he may have the remaining Sum, which is not yet invested in the Purchase of Lands, laid out in such Purchase. With regard to that Part of the Bill which prays, that the remaining Part of the Money may be laid out in the Purchase of Lands, it is admitted now at the Bar, that that Part of the Relief is not proper to be insisted on in the present Bill, for want of the Commissioners being made Parties, because it is admitted, that it is not in the Power of *Blackerby* to place out Money in the Purchase of Lands without the Order of the Commissioners, and no such Order has been made by them. His Lordship said, that he would consider the other Parts of the Relief which the Plaintiff insists on in three Respects; In the first Place, Whether the Plaintiff is come into a proper Court that can give him this Relief? Secondly, Whether he has brought proper Parties before the Court? And, Thirdly, Whether the Plaintiff is intitled to this Relief in respect of the Merits and Justice of the Case. With regard to the first of these Questions his Lordship said his Opinion was, that the Plaintiff was not come into a proper Court which could give him this Relief. It does not seem to have been the Intention of the several Acts, that have been made in relation to the Building the Fifty new Churches, that Disputes of this Kind should be determined in the ordinary Courts of Justice, but that they ought to be determined only by the Commissioners themselves. The Intention of these Acts seems to have been the same in this respect, as it is in the Acts relating to the Turnpikes. But supposing this Objection was out of the Case, the natural Court for the Plaintiff to apply to is the *King's Bench* to grant a *Mandamus*, and not to a Court of Equity to take an Account. These Acts have put this Matter quite into another Method. They have

Where the Intention of a Statute is, that Disputes should only be determined by the Commissioners appointed by the Act, and not by the ordinary Courts of Justice.

How far the Intention of the Statutes which relate to the Building the Fifty new

directed

Churches was, that the Commissioners should determine Disputes which might arise concerning them. How far the Commissioners relating to the Turnpikes have the sole Power to determine Disputes concerning them.

Where the proper Remedy is to apply to the *King's Bench* for a *Mandamus*, and not to the Court of *Chancery*.

Where the only Remedy is to apply to the Court of *Exchequer* in relation to the 50 new Churches.

How far by the Stat of 3 Geo. 2. The Treasurer has no Authority to pay any Money without an Order from the Commissioners.

All the several Acts relating to the Building the 50 new Churches must be construed together, and carried one into another.

directed the Money allotted for the Building the Fifty new Churches in the first Place to be brought into the *Exchequer*, from thence to be paid out into the Hands of the Treasurer; and when it is in his Hands to be subject to the Order of the Commissioners. If the Commissioners do not do their Duty, the proper Court to apply to is the *King's Bench* to grant a *Mandamus*. The Treasurer is to pass his Accounts in the *Exchequer*, and those Accounts ought not to be examined into before a Master of this Court. The Account is to be settled before the Auditor of the Imprest; and in case the Auditor makes any improper Allowance, his Lordship said he did not know that there was any Remedy but to apply to the Court of *Exchequer*; that is the Court that has a Jurisdiction over the Auditor, and can correct the Errors which he makes in his Accounts. His Lordship said, that he would now consider, whether the Plaintiff has brought proper Parties before the Court. Here is no Body brought before the Court but the Treasurer, who is an Officer under the Commissioners. It has been said, that the Plaintiff is proper in seeking his Remedy against him only in respect of the Dividends of the Annuities, because the Act gives Authority to the Treasurer to pay the Dividends according to the Direction of the Acts, subject indeed to the Order and Control of the Commissioners. But his Lordship said, that he was by no means satisfied that this was the Intention of the Stat. of 3 Geo. 2. upon which the present Bill is founded. All the several Acts relating to the Building the Fifty new Churches must be construed together, and carried one into another. If this was not to be the Case, some of the Provisions in them would be extremely Lane and Defective. His Lordship said, that in the Course of this Cause he had asked whether there was any Clause which did direct, that the Treasurer should have an Authority to pay the Dividends as they should accrue. But no such Clause has been shewn. What then is the Meaning of these several Statutes? The first of these Statutes is that of the 9th of the late Queen; that directs, that the Money shall be paid into the *Exchequer*.

quer. The next Statute is that which was made in the Year following; that Act directs, "that the Money shall be
" paid unto such Person and Persons, not being of the Num-
" ber of the Commissioners, as her Majesty, her Heirs and
" Successors, shall from Time to Time direct and appoint to
" be the Treasurer or Treasurers in this Behalf, and shall be
" received by him or them by way of Imprest, and accounted
" for only by such Treasurer or Treasurers, and shall be
" disbursed, expended and applied by such Treasurer and
" Treasurers respectively, according to such Orders and
" Warrants as he or they shall receive from Time to Time
" from the said Commissioners, or any five of them, for
" all or any the Uses or Services, by this or the said former
" Act prescribed, or allowed in that Behalf, and not
" otherwise, or to any other Use, Intent or Purpose what-
" soever." So that from the Time of making that Act the
Treasurer is not allowed to pay any Money without such
Warrant as has been mentioned. In the first of *Geo. 1.*
another Act was made relating to the Building these
Churches; and in that Act there is a Clause, "That all
" and every the Powers, Authorities, Penalties, Forfei-
" tures, Disabilities, Articles, Rules and Clauses in the
" same Acts, Laws and Statutes, or any of them mention-
" ed, or contained (except such, and so much of them,
" for and concerning which it is otherwise provided in this
" present Act) shall be of such Force and Effect, to all
" Intents and Purposes, for the Raising, Levying, Collect-
" ing, and answering the Impositions hereby granted, for
" and during the said Term herein before limited, as if the
" same were particularly, and at large set down and enact-
" ed by this Act." This is an express Declaration, that
in this Respect the one Statute is to have a Reference to
the other. Then comes the Statute of 3 *Geo. 2.* which
the present Case immediately relates to. The material
Clause in that Statute, regarding the present Purpose, is in
these Words, "That for and towards Raising the said
" Maintenance the Sum of 3000*l.* of lawful Money of
" Great Britain, Part of the Monies intended by the
" said Act of the first Year of his late Majesty's Reign, to
5 E. " be

“ be raised and applied for the making Provisions for the
 “ Ministers of the said Fifty new Churches, shall be allotted
 “ ed and appointed for and as the Share and Interest,
 “ which the Rector for the Time being of the said new
 “ Parish Church in or near *Bloomsbury Market* shall have,
 “ and be intitled to, out of the same Monies. And the
 “ Treasurer for the Time being of the said Commissioners
 “ is hereby requir’d and authoris’d, by and out of the
 “ Monies which are or shall be issued to him, in pursu-
 “ ance of the said Act of the first Year of his late Majesty’s
 “ Reign forthwith, as soon as conveniently may be, to lay
 “ out and dispose of the said Sum of 3000 *l.* or any Part
 “ thereof, according to such Orders and Warrants as he
 “ shall from Time to Time receive from the said Commis-
 “ sioners, or any five or more of them, in purchasing
 “ Lands, Tenements, Fee-Farm Rents, Ground-Rents, or
 “ other Hereditaments in Fee-simple, to be conveyed to,
 “ and settled upon and to the Use of the said Rector of
 “ the said new Church for the Time being, and his Suc-
 “ cessors in the said Church for ever, for and towards his
 “ and their Maintenance; and in the mean Time in
 “ Trust for the said Rector to place out the said Sum of
 “ 3000 *l.* or any Part thereof, according to such Orders
 “ and Warrants as he shall receive from Time to Time
 “ from the said Commissioners, or any five or more of
 “ them, on real Security or Securities, or publick Funds,
 “ and to pay the Interest or Produce thereof to such Rec-
 “ tor of the said new Church for the Time being, from
 “ Time to Time, as the same shall be received for and to-
 “ wards the Maintenance of such Rector. And also out
 “ of the Monies arising as aforesaid, to pay to such Rector
 “ the Interest of the said principal Sum of 3000 *l.* from
 “ the 24th Day of *June* 1730 until the said principal
 “ Money shall be invested in a Purchase, or placed out
 “ on Securities as aforesaid.” It has been said, that ac-
 cording to this latter Clause the Treasurer is impowered to
 pay the Interest of this 3000 *l.* to the Rector, without a
 Warrant from the Commissioners, though he is not im-
 powered to lay it out in the Purchase of Lands, or to in-
 vest

vest it in Securities without such Warrant. And 'tis indeed true, that there is some Variety in the Penning of these Clauses, but yet there hardly seems to be such a Variety as to make a Warrant necessary in the other Cases, and not in this; at least it seems to be very reasonable, that there should have been a general Order from the Commissioners upon the Treasurer, for Payment of the Dividends as they should arise, but no such Order has been made or applied for; and without it it is extremely improper to think of making the Treasurer a Defendant without the Commissioners. It has been said, that the Commissioners are very numerous, and that on that Account 'tis not proper that they should all be made Defendants. And 'tis indeed true, that there were many Cases which arose in the Year 1720, wherein the Court held, that where there were Undertakings carried on by a great Number of Persons, it should be sufficient to make some of the Managers Parties. But that Case does not come up to the present one. His Lordship then said, that having declar'd thus much with regard to the Form of the present Proceedings, he would now make some Observations with regard to the Merits. One of the Things insisted on is, that the Plaintiff is intitled to the Dividends of the *South-Sea* Annuities which accrued between *Midsummer* 1730 and the *Michaelmas* following. But it is agreed on all Hands, that the Plaintiff was not admitted, instituted and inducted till the *February* after, and therefore this Part of the Prayer in the Bill does not seem to be reasonable. It has been said, that when an Incumbent dies, and a Vacancy by that Means happens in the Church, the Successor shall be intitled to the mean Profits of the Living, deducting the Allowance which is to be paid to the Sequestrator. But the present Case is greatly different from that; there the Revenues of the Church have been a long Time fixed and established, but here the Plaintiff was the first Person that could ever be said to be intitled to them. The next Que-

How far the Treasurer of the 50 new Churches cannot pay out Money without an Order of the Commissioners.

How far Commissioners must be made Defendants to a Bill notwithstanding the Number of them.

How far the Rector shall not be intitled by 3 G. 2. to any Dividend which accrued before he became Rector.

How far a Person shall not be intitled to

such a proportionable Part of a Dividend which had accrued before the Dividend became due.

tion relates to that Part of the Bill whereby the Plaintiff prays that he may have an Allowance for such Part of the Dividend as had accrued from *Lady-day* 1733 to the 5th of *September* following. And 'tis indeed true, that a considerable Length had run in the Dividend arising upon this Stock. And if the Stock had continued unfold till the 29th of *September*, undoubtedly the Plaintiff would have been intitled to the whole of the Dividend. But how can the Court direct this, as the whole of the Dividend was not incur'd? It has been said, that on the 20th of *August* in that same Year, the Warrant issued for selling out the Stock; and from thence it was insisted, that at least he was intitled to have the Dividend which accrued from that Time. But no such Inference can be drawn. The remaining Question relates to such Part of the Bill whereby it is pray'd, that the remaining Part of the *South-Sea* Annuities, which had not already been laid out in the Purchase of Lands, might now be laid out in such Purchase. But as to that the Commissioners ought to be applied to for granting their Warrant for that Purpose. And as no such Application has been made, the Court cannot direct this, especially without having the Commissioners before the Court. Thereupon it was desired, that the Cause might stand over in order that the Commissioners might be made Defendants. Accordingly on Payment of Costs the Court directed that it should do so.

March 12.

Lloyd and Spillit.

1740. 12. 12.

S*Tamp* made his Will, and thereby gave all his Estate both real and personal to Charitable Uses. Afterwards in the same Year he executed Deeds of Lease and Release, whereby, in Consideration of natural Love and Affection, and likewise in Consideration of the Sum of 10 s. he conveyed all his real Estate to *Howse, Froom and Spillit*, to have and to hold to them and their Heirs, to their own proper Use and Behoof. In this Deed there was a *Proviso*, that

it should be in the Power of *Stamp* to revoke this Deed at any Time during his Life. *Howse* and *Froom* were Relations to *Stamp*, and *Spillit* was an intimate Friend of his. Afterward in the same Year *Stamp* executed a Deed of Bargain and Sale, whereby he conveyed to the Persons before-mentioned all his personal Estate. In this Deed there was one *Proviso*, that *Stamp* should enjoy this personal Estate during his Life; and there was another *Proviso* whereby he had a Power to revoke this Deed at his Pleasure. *Stamp* died.

The present Bill was brought by *Lloyd* and others, who were his Heirs at Law, and next of Kin, against *Spillit*, *Howse* and *Froom*, in order to have the Benefit of this real and personal Estate.

On the Hearing of this Cause *Lord Chancellor* was of Opinion, that the Bill ought to be dismissed. That Cause was now reheard. The Ground of the Rehearing was, that the Plaintiffs were intitled, by Way of resulting Trust, both to the real and personal Estate.

Lord Chancellor said his Opinion was, that the Plaintiffs were no way intitled either to the real or personal Estate in the present Case. He said he was the rather willing to hear this Case fully spoke to, because he was satisfied, that according to the Intention of the Testator, neither the Plaintiffs nor the Defendants were designed to have the Benefit of his Estate, his Intention being that it should be employed to Charitable Uses. However he said, that must not be the Rule to influence his Judgment by, but he must determine the Cause according to the Rules of Law and Equity. With regard to the personal Estate, there is no Ground for the Plaintiffs to have Relief given them as to that. The Deed, whereby the personal Estate was conveyed, amounted to a Bill of Sale of all the Goods and Chattels of *Stamp* whatsoever; in this Deed there is one *Proviso*, that *Stamp* should enjoy the Benefit of them during his

Where there shall be a resulting Trust in relation to a personal Estate.

How far a Will shall defeat a Person from all Benefit of a resulting Trust.

How far a Will relating to personal Estate shall not be revoked by a Deed made subsequent to it.

Where the legal Estate shall pass by a Deed, notwithstanding an Objection, that there wanted a sufficient Consideration.

The Consideration of 5*l.* is sufficient to raise an Use.

Where there shall not be a resulting Trust with regard to a real Estate.

Life. And there is another *Proviso*, that *Stamp* should have a Power of Revoking this Deed at any Time during his Life. The Case with regard to the personal Estate is not affected by the Statute of Frauds and Perjuries, as the Case with regard to the real Estate is. So that it might be a very considerable Question, whether there is not a resulting Trust for the Benefit of *Stamp*, and consequently for the Plaintiffs with regard to that. But then it is to be observed, that here is a Will made by *Stamp*, which operates upon all the personal Estate, and conveys it to certain charitable Uses; so that the Plaintiffs in no Events can be intitled to any Benefit of that. 'Tis indeed true, that the Will was made previous to this Deed. But that Part of the Will with regard to the personal Estate is not revoked by it, and the Will has an Effect to convey all such personal Estate, as the Testator may be intitled to at the Time of his Death. With regard to the real Estate, it has been insisted on the Part of the Plaintiffs, that it is even doubtful, whether the legal Estate passed by the Deeds of Lease and Release; and the Ground of that Objection has been, that there wanted a sufficient Consideration. But there is no Ground to say, that the legal Estate did not pass by this Conveyance. This is a Conveyance that operates by Way of Transmutation of the Possession to the Use. It is made in Consideration of natural Love and Affection. And as to Two of the Defendants, that Part of the Consideration was clearly good, for they were Relations to *Stamp*. There is the farther Consideration of 10*s.* and if there was no more than that alone, it would be sufficient to raise a Use for the Benefit of the Grantees; and by the Statute of Uses they in Consequence must be intitled to the legal Estate. The next Question is, and that has been the most laboured, whether with regard to the real Estate there was a resulting Trust for the Benefit of *Stamp*, and consequently for the Benefit of the Plaintiffs. But his Lordship's Opinion was, that with regard to the real Estate there was no such resulting Trust. The Ground upon which it has been contended, that there was such resulting Trust, has been, that there was not a sufficient

sufficient Consideration to pass the beneficial Interest. The Consideration is the natural Love and Affection which the Deed says *Stamp* bore to *Howse*, *Froom* and *Spillit*, and likewise the Consideration of ten Shillings. But his Lordship said, he did not think it material to enter into the Question, Whether these Considerations were sufficient to pass the beneficial Interest in this Estate, or not, by Reason that here there is an express Use declared for the Benefit of the Grantees. And even at Common Law, before the Statute of Uses, where a Feoffment was made without any Consideration, yet if that Feoffment was declared to be for the Benefit of the Feoffee and his Heirs, there was no resulting Use for the Benefit of the Feoffor. Many old Feoffments were of that Nature. Uses were introduced in order to avoid Forfeitures to the Crown when contests ran high between the Houses of *York* and *Lancaster*. They were introduced likewise in order to avoid Wardships, and the Consequences arising from the Tenures that were then subsisting. They were commonly made Use of for a fraudulent Purpose. Then it was that the Distinction arose between the legal Estate and the Use. And where a Feoffment was made, or a Fine levied without a Consideration, then it was that the Notion of a resulting Use began. But all that reasoning about resulting Uses is out of the Case; because here the Use is expressly declared to be for the Benefit of the Grantees. Since the Statute of Uses, a third Distinction has been introduced, by considering the Trust as distinct from the Use. And tho' it has been admitted in this Part of the Argument, that the Estate is executed to the Use; yet it has been said, that there is no Trust in this Case declared to the Grantees; and therefore that there is a resulting one for the Benefit of *Stamp* and his Heirs. And however that might have been the Case between the Statute of Uses and the Statute of Frauds and Perjuries; yet since the Statute of Frauds, his Lordship's

Opinion

It is not material that there should be a Consideration to intitle a Person to the Benefit of an Estate, when there is an express Trust of that Estate declared for his Benefit.

At the Common Law there was no resulting Use for the Benefit of the Feoffor, when there was an express Use declared.

Uses first became frequent when the Contests arose between the Houses of *York* and *Lancaster*.

Uses were frequently introduced in order to avoid Wardships.

When it was that the Notion of resulting Uses began.

How far a resulting Trust was

allow'd between the Statute of Uses and the Statute of Frauds and Perjuries.
How far a resulting Trust is not allowable since the Statute of Frauds and Perjuries.

Opinion was, That there could be no such resulting Trust in the present Case. 'Tis indeed true, that in that Statute there is an Exception of Trusts arising by Operation of Law. But his Lordship said, that those have been but of two Kinds, either where the Conveyance has been taken in the Name of one Man, and the Purchase-money paid by another, or where the Owner of an Estate has made a voluntary Conveyance of it, and made a Declaration of the Trust with regard to one Part of the Estate, and has been silent with regard to the other Part of it. The Reason why this Court has allow'd a Trust by Operation of Law to arise in the latter Case, has been, that the Party, by declaring Part of the Trust to be for another, and by saying nothing with regard to the other Part of it, shews his Intention to be, that the other was to have only one Part of the Trust, and consequently he himself ought to have the Benefit of the other Part of it. These his Lordship said have been the only two Instances that he remembered of Trusts, that have been allowed of to arise by Operation of Law since the Statute of Frauds and Perjuries, unless where there has been a plain and express Fraud. Where there has been a Fraud in gaining a Conveyance from another, that may be a Reason for making the Grantee in that Conveyance to be considered meerly as a Trustee. But in the present Case no such Fraud can be pretended to have been made upon *Stamp*. He executed these Conveyances knowingly and on Purpose, and very probably with an Intent that the Parties mentioned in them should be Trustees for the Charities created by his Will. It has been said, that it could not be the Intention of *Stamp*, that the Defendants should enjoy the beneficial Interest in this Estate. But provided they have the legal Interest in it, 'tis incumbent on the Plaintiffs to make out such a Trust as is consistent with the Statute of Frauds. In these Deeds *Stamp* reserved to himself a Power of Revocation, but he never thought proper to execute it. And that is an

What Kind of Trusts arising by Operation of Law have been allowed since the Statute of Frauds and Perjuries.

How far Trusts by Operation of Law have been, where the Conveyance has been taken in the Name of one Man, and the Purchase-money paid by another.

Where the Owner of an Estate has made a voluntary Conveyance of it, and made a Declaration of the Trust with regard to Part of the Estate, and has been silent with regard to the other Part of it, the Court has allow'd a Trust to arise by Operation of Law with regard to the other Part of it.

Where there has been a Fraud in gaining a Conveyance from another, that

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may be a Reason for making the Grantee in that Conveyance to be considered meerly a Trustee.

Argument to shew, that he never intended it should be executed. Accordingly the Decree was affirmed.

Landen and Green.

March 1st.

IN 1711 *John Landen* made his Will, and thereby gave the Residue of his personal Estate to *Tapper Landen* his only Son. After the Death of *John*, *Tapper* died Intestate within a few Months. On his Death *Elizabeth* his Widow took out Administration to him, and likewise Administration with the Will annex'd of *John*. At the Time of the Death of *Tapper* he had Issue one Daughter named *Susanna*, who was then but two Years of Age; but *Elizabeth* was at that Time Enfeint with a Son, who was afterwards named *John*. The personal Estate of *Tapper* was a very considerable one, and Part of it consisted in Mortgages. Some Time after the Death of *Tapper*, *Elizabeth* intermarried with *George Green*. *George* called in the Money which was due on some of the Mortgages.

In 1728 *Susanna* brought her Bill against *George Green* and *Elizabeth*, in order to have an Account of the personal Estate which belonged to *John* the Grandfather, and likewise to *Tapper*.

In 1738 this Cause was heard at the Rolls, and a Decree was made for the Plaintiff, but a Direction was therein given, that all Parties should have their Costs generally out of the Estate.

From this Decree there was an Appeal, which now came on to be heard. One Ground of the Appeal was, that the Defendants should only have had their Costs given them to the Time of the Decree, and that the remaining Part of those Costs should have been reserved. And another Ground of it was, that tho' the Defendants ought not to have been charg'd with Interest at the Time that Decree

was pronounced, yet the Court should have reserved the Consideration of that Question to have been determined after the Account was taken.

Lord Chancellor said his Opinion was, That the Decree ought to be rectified in both these Respects. He said it was very true, that it was not the Rule of the Court to charge an Administrator with Interest at all Events. On the other Hand it must be admitted, that there are many Cases in which an Administrator shall be charged with Interest. And in the present Case there is a reasonable Ground that the Question relating to Interest should have been reserved. *Elizabeth*, and her Husband after her, have been in the Possession of two considerable personal Estates near thirty Years together. Part of the personal Estate was standing out upon Mortgages, but *George* thought proper to call the Money in. These are so plain Reasons for reserving the Consideration of Interest, that, if that Matter had been mentioned at the Hearing, the Court must have reserved it. With regard to the Question, concerning the Allowing the Defendants their Costs, his Lordship said his Opinion was, that though it was right to give the Defendants those Costs that had been incur'd at the Time of the Hearing, yet the subsequent Costs should have been reserved. Administrators, like other Trustees, will be intitled to all their Costs, in case they deserve them. But in the present Case there was a Ground for reserving the Costs which would be incur'd subsequent to the Decree, as well as there was a Ground for reserving the Consideration of Interest. And so his Lordship was pleased to decree accordingly.

Tho' an Administrator ought to have Costs given him to the Time of the Decree for the Account, in what Cases the subsequent Costs ought to be reserved.

*Griffyn and Griffyn.**March 16.*

IN 1702 *Benjamin Griffyn* made his Will, wherein were the Words following. “As for the worldly Goods and Estate which the Lord hath graciously intrusted me withal, I give and dispose thereof as follows.” He then gave to his Son *Giles Griffyn* a certain Parcel of Lands; and to his Son *Benjamin* another Parcel of Lands when he should obtain the Age of Twenty-one. And then came the Words following. “I give to my three Sons *John, William* and *Samuel*, all that Messuage or Dwelling-House, Barns, Stables and Out-Houses, with all the Lands thereunto belonging, lying in the Liberty of *Winish* in the Parish of *Hurst*, and now in the Occupation of *Thomas Burrott*, being 41 *l.* a Year, after their Mother’s Decease, to be equally divided amongst them, or the Sum of 300 *l.* apiece to be paid them, as they shall come to the Age of Twenty-one Years each; which my Executor shall see most convenient. *Item*, I give to my Son *Jacob* the Dwelling-House with the Appurtenances thereunto belonging, called the *King’s Head* in *Wockingham*, and now in the Occupation of *George Maynard* and *Thomas Cottendale* (after the Decease of his Mother) to him and his Heirs for ever, or the Sum of 300 *l.* as my Executor shall think fit, to pay it him at the Age of Twenty-one Years. *Item*, I give to my Son *Nathaniel* my own Dwelling-House, and the Dwelling-House adjoining, and now in the Occupation of *Elizabeth Ward*, (which Houses are in the Town of *Wockingham* aforesaid) with all their Appurtenances, to him and his Heirs for ever, or the Sum of 300 *l.* to be paid him by my Executor at the Age of Twenty-one Years. *Item*, I give to my Daughter *Mary* the Sum of 300 *l.* to be paid her at the Age of Twenty-one Years. *Item*, I give to my two Kinsmen *John* and *Samuel Ward* 5 *l.* apiece, to be paid them at the Age of Twenty-one Years each. And my
“ Will

“ Will is, that if any of the Legatees, to-whom any of the
 “ within mentioned Legacies are bequeathed, happen to
 “ die before they come of Age; or if after they are of
 “ Age, and have not otherwise disposed of their Legacy
 “ or Legacies; that then the Legacies therein bequeathed
 “ them shall descend unto, and be equally divided
 “ amongst the Survivors, my two Kinsmen *John* and *Samuel Ward* only excepted, together with the Legacy of
 “ 50 *l.* a Year, which are to be and remain as they are
 “ first given. Excepting also, that if all my Children
 “ happen to die without Heirs, not having received their
 “ Legacies, then my Will is, that all the Estate in Houses
 “ and Lands herein bequeathed, but not the Money, shall
 “ after my Wife’s Decease come to, and be equally divided
 “ amongst, the Children of my Sister *Ward*, being to them
 “ and their Heirs for ever. And all the Rest and Residue
 “ of my Estate, Goods and Chattels not herein before be-
 “ queathed, after my Debts and Funeral Expences dis-
 “ charged, I give and bequeath unto my loving Wife,
 “ *Anne Griffyn*, whom I make sole Executrix.” In the
 same Year *Benjamin* died. At the Time of his Death he
 left *Anne* his Widow and seven Sons, *Giles*, *Benjamin*, *John*,
William, *Samuel*, *Jacob* and *Nathaniel*; and one Daughter
 named *Mary*. *John*, *William* and *Samuel* died in the Life-
 Time of *Anne* unmarried, and under the Age of Twenty-
 one. *Mary* intermarried with *Richard Palmer*, and in 1728
 they both died in the Life-Time of *Anne*, leaving three
 Children, *Richard*, *Robert* and *Mary*. After this *Anne*
 made her Will, and thereby gave all and every her Meffu-
 ages, Lands, Tenements and Hereditaments, which were
 then in the Tenure or Occupation of *Henry Moore*, and si-
 tuate in the Parish of *Hurst* in the County of *Wilts* and
Berks, or one of them, to *Nathaniel* and his Heirs, paying
 thereout unto his Brothers and Sisters such Money as
Benjamin Griffyn, her late Husband, by his Will di-
 rected to be paid them out of the Premises; and also
 one Shilling more to each of them. This Estate, which
 was devised by the Will of *Anne* to *Nathaniel*, was the
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very same Estate which was comprehended in the Devise to *John, William* and *Samuel*, by the Will of *Benjamin*; and this Estate *Anne* entered upon on the Death of *Benjamin*, and continued in Possession of it to the Time of her Death. On the Death of *Anne*, *Giles* enter'd upon the Possession of those Lands which were contained in her Will, as Heir at Law to *Benjamin*.

The present Bill was brought by *Nathaniel* against *Giles*, and the other Children of *Benjamin*, and their Representatives, praying, that *Giles* might Account for the Profits of the Estate, which was devised by the Will of *Anne* to *Nathaniel*; and that such Sums of Money might be raised upon it, as this Estate was charged with by the Will of *Anne*.

On the Hearing of this Cause *Lord Chancellor* thought it was a Matter of some Difficulty, and accordingly directed it to stand for Judgment, and now he was pleased to deliver his Opinion on it. He said his Opinion was, that the Plaintiff was well intitled to Relief. The general Question in the present Case is, Whether the Lands in the Parish of *Hurst*, devised to *John, William* and *Samuel*, by the Will of *Benjamin*, passed to *Nathaniel* by the Will of *Anne*? That depends upon three Considerations. In the first Place, Whether *Anne* had it in her Power to make an Election, whether *John, William* and *Samuel*, and their Representatives, should take the Land or 300 *l.* in Money? Secondly, Whether *Anne* had the Land given to her by the Will of *Benjamin*, in case she should make an Election, that they should have the Money, and not the Land? And, Thirdly, Whether she has made an Election in a due Manner, that the Representatives should have the Money and not the Land? With regard to the first of these Questions his Lordship's Opinion was, that *Anne* had it in her Power to make an Election, that *John, William* and *Samuel* should have the Money, and not the Land; this depends upon the Construction of several Clauses in the Will of *Benjamin*. It appears

Where a Person shall have a Power to make an Election, whether another shall have Land or Money.

that he intended by his Will to make an intire Disposition of his whole Estate both real and personal; for this Purpose the Beginning of the Will is, "As for the worldly Goods and Estate which the Lord hath graciously intrusted me withal, I give and dispose thereof as follows." In Consequence of this he has made particular Devises of certain Parts of his real Estate, and has given certain pecuniary Legacies; and then comes this Clause, *All the Rest and Residue of my Estate, Goods and Chattels not therein before bequeathed, after my Debts and Funeral Expences discharged, I give and bequeath to my loving Wife Anne Griffyn, whom I make sole Executrix.* Anne it was who had a Power to determine, whether the three Sons should have the Land which was devised to them, or 300*l.* apiece in the Room of it. The Words of that Clause for this Purpose are, *I give to my three Sons John, William and Samuel, all that Messuage or Dwelling-House, Barns, Stables and Out-Houses, with all the Land thereunto belonging, lying in the Liberty of Winish in the Parish of Hurst, and now in the Occupation of Thomas Burrott, being 41*l.* a Year, after their Mother's Decease, to be equally divided amongst them, or the Sum of 300*l.* apiece to be paid them, as they shall come to the Age of Twenty-one Years each, which my Executor shall see most convenient.* This makes way for the second Question, Whether Anne had the Land given to her by the Will of Benjamin, in case she should make an Election that they should have the Money, and not the Land? And as to that his Lordship's Opinion was, that she had. The Clause that gives her this is the Residuary Clause at the End of the Will. It has been objected, that this Clause will not have that Effect, by reason that the Word *Estate* when coupled with *Goods and Chattels* conveys only personal Estate. And 'tis indeed true, that in Cases of this Sort the Word *Estate* has been construed to extend to personal Estate only. But that Rule only holds where there are not other Clauses in the Will which shew, that the Word *Estate* ought to receive another Construction. And in the present Case there are such Words. The Beginning of the Will, as has been said, shews an Intention in Benjamin

Where the Person who made the Election shall have that Thing which he elected the other should not have.

Where the Word *Estate* will convey only personal Estate, by reason that it is coupled with the Words *Goods and Chattels*.

min to dispose of his whole Estate. There are subsequent Parts of his Will, wherein he disposes both of real and personal Estate, and therefore the residuary Clause shall be applicable to both. This is agreeable to the Reasoning of the Court in *Mod.* 6. 108. And this Argument is strengthened by an Observation which has been made at the Bar, that if *Anne* was not to have the Residue of the real Estate, as well as the *Residuum* of the personal, it would have been absurd in the Testator to have given his three Sons either the Land or the Money, which his Executrix should see most convenient; when undoubtedly in that Case she would have thought it most convenient that they should at all Events have had the Land, and not the Money. But then another Objection has been made, arising from the Clause which directs, that there shall be a Survivorship. It has been said, that the Word *Legacy* will include a Devise of Land as well as a Bequest of personal Estate; that the Will directs, that in case any of the Legatees die, their Legacies shall go to the Survivors; and that the three Sons did die without Issue in the Life-Time of *Anne*; so that it has been urged that she never could have the Benefit either of the Land or the Money which was given to those three Sons; and consequently that the Survivors are intitled. And 'tis indeed true, that the Word *Legacy* will include a Devise of real Estate, as well as a Bequest of personal; but yet his Lordship's Opinion was, that *Anne* was well intitled to the Land in the present Case. The Words of the Clause of Survivorship are, *And my Will is, that if any of the Legatees, to whom any of the within mentioned Legacies are bequeathed, happen to die before they come of Age; or if after they are of Age, and have not otherwise disposed of their Legacy or Legacies, that then the Legacies therein bequeathed them shall descend unto, and be equally divided amongst the Survivors, my two Kinsmen John and Samuel Ward only excepted, together with the Legacy of 50*l.* a Year, which are to be and remain as they are first given; excepting also, that if all my Children happen to die without Heirs, not having received their Legacies, then my*

Where the Word *Legacy* will include a Devise of Land.

Will

Where nothing shall go to Survivors but what did originally vest in the first Takers.

Where a Person shall be said to have duly made an Election, that another shall have Money, and not Land.

Will is, that all the Estate in Houses and Lands herein bequeathed, but not the Money, shall after my Wife's Decease come to, and be equally divided amongst the Children of my Sister Ward, being to them and their Heirs for ever. By this Clause there is nothing directed to survive but what did originally vest in the first Takers; and in the present Case, neither the Land nor the 300*l.* apiece did vest in the three Sons, they all of them dying before the Time that their respective Interests were to vest in them. But then an Objection has been made on the Part of the Children of Mrs. Ward. And it has been said, that they are intitled to take before Anne can have any Thing. There are two Answers which may be given to this Objection. In the first Place, Nothing is given to the Children of Mrs. Ward but the real Estate, so that Anne must have made her Election, that the three Sons should take the Land and not the Money, in order that the Children of Mrs. Ward should have had any Benefit of this Part of the Devise relating to the three Sons; but in Fact Anne has shewn her Election directly to the contrary. Another Answer to this Objection is, that the Children of Mrs. Ward are not to take till all the Children of Benjamin die without Issue, so that it is impossible that they can have any Claim to this Estate at present. It has been said indeed, that as there were more Children of Benjamin than two, there can be no such Cross Remainders. And it is indeed true, that Cross Remainders by Implication cannot take Effect where there are more Children than two. But that Rule was never understood where Cross Remainders are limited by express Words; and that that Rule is so to be understood appears by *Croke 2. 655.* and *Ven. 2. 234.* The remaining Point to be considered is, Whether Anne has duly made her Election, that the Representatives of the three Sons should have 300*l.* apiece, and not the Land. And his Lordship was of Opinion that she had. This Election is made by her Will, and her Will is to this Effect. She thereby gave *all and every her Messuages, Lands, Tenements and Hereditaments which were then in the Tenure of, or Occupation of Henry Moore, and situate*

in the Parish of Hurst in the County of Wilts and Berks; or one of them, to Nathaniel and his Heirs, paying thereout unto his Brothers and Sisters such Money as the said Benjamin Griffyn, her late Husband, by his Will directed to be paid to them out of the said Premisses, and also one Shilling more to each of them. It has been objected, that *Anne* could not properly execute this Power of Election by her Will. But his Lordship's Opinion was that she might. There's nothing in the Will of *Benjamin* that does restrain her from doing it by Will; but then it has been said, that *Anne* has given this Estate to *Nathaniel* and his Heirs, *paying thereout unto his Brothers and Sisters such Money, as the said Benjamin Griffyn, her late Husband, by his late Will directed to be paid to them out of the said Premisses.* And it has been urged, that *Benjamin* by his Will by no means directed, that the Lands should be charged with any Sum of Money at all. But notwithstanding this Objection his Lordship's Opinion was, that the Plaintiff was well intitled to this Estate. He said there was some Colour for her expressing herself in that Manner, because even under the Will of *Benjamin* a Court of Equity would have consider'd the Land as a Security for the Money. And so his Lordship was pleased to decree accordingly.

Where a Person may make an Election by Will, that another shall have a Sum of Money, and not Land.

Where a Court of Equity will consider a Sum of Money to be charged upon Land.

Eales and Gee.

March 18.

ON the Marriage of *William Weaver* with *Mary* his Wife, a Settlement was made, by which a considerable real Estate was settled on the first and other Sons in Tail, but no Provision in it was made for the Benefit of younger Children. By this Marriage there was Issue *John* the eldest Son, and several younger Children. *William* a short Time before his Death requested *John*, that as he should be able to leave hardly any personal Estate more than would be sufficient to satisfy his Debts, that *John* would give 200*l.* to his younger Brothers and Sisters out of the real Estate that would come to him on the Death of *Wil-*

liam,

liam, and *John* promised him that he would. *William* made his Will, and thereby appointed *Gee* and *Mousley* his Executors. *William* died, and on his Death *Gee* and *Mousley* required of *John*, that he would enter into a Bond to secure the 200*l.* to his younger Brothers and Sisters, according to the Promise that he had made to *William*. *John* refused to give any Security for so much Money. However, upon their giving him 30*l.* out of the personal Effects of *William*, he entered into a Bond to them by Way of Security, for 120*l.* for the Benefit of his younger Brothers and Sisters. *John* intermarried with *Mary*, and died in 1733. On the Death of *John*, Administration, with his Will annexed, was committed to *Mary*. Afterwards *Mary* intermarried with *Robert Eales*. *Gee* and *Mousley* brought their Action on the Bond before-mentioned against *Robert* and *Mary*.

The present Bill was brought by *Robert* and *Mary* against *Gee* and *Mousley*, setting forth, that the Assets of *John* were not likely to prove sufficient to satisfy all his Debts and Legacies; and insisting upon it, that this Bond ought to be consider'd as a voluntary one. Thereupon the Bill pray'd, that the Payment of this Bond might be postponed to the Payment of all just Debts whatsoever belonging to *John*, and that an Injunction might be granted to stay the Proceedings in that Action.

On the coming in of the Answers, the Fact appeared to be to the Effect that is before set forth.

The Counsel for the Plaintiff came now to shew Cause, why the Injunction should not be dissolved.

Where a Bond given by an elder Brother at the Request of his Father, for the Payment of a Sum of Money by Way of Provision for his younger Brothers and Sisters, shall not be considered as a voluntary one.

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given

Lord Chancellor said his Opinion was, that the Cause ought to be disallowed; he said, that this is a Bond that is

given by an eldest Son by Way of Provision for his younger Brothers and Sisters, and it cannot be called a voluntary Bond. 'Tis indeed true, that where a voluntary Bond is entered into, this Court will postpone the Payment of it after all just Debts. But this is not such a Bond as can come under that Description. And so his Lordship was pleased to order accordingly.

Bradly and Stratchy.

March 19.

Ac. 2. Alk. 217. 1. Brooming. p. Fuller 125.

THE Plaintiff was Patron of a Church, and the Defendant was Parson of it. The Defendant had committed Waste upon the Glebe.

Thereupon the present Bill was brought by the Plaintiff against the Defendant, in order to have an Injunction to restrain the Defendant from committing any farther Waste upon it; and an Affidavit was made, setting forth that he had committed this Waste. Last Night an Application was made in order to have an Injunction.

Lord Chancellor at that Time thought that this was not such a Case wherein the Court could interpose by Granting an Injunction, and inclined to think likewise that the Affidavit was hardly sufficient. His Lordship said now, that he had considered of this Case again, and he was fully satisfied, that the Injunction ought to be granted. He said, that when this Matter came before the Court, he thought at that Time that a Bill could not be brought by the Patron against the Parson, in a Case of this Nature, and that the proper Remedy was for a Bill to be brought in the Name of the *Attorney General*, at the Relation either of the Patron or of some other Person. But now he was convinced that a Bill of this Kind might well be brought by the Patron. It appears by *Richard Liford's Case* in 11 Rep. 49. that

A Bill may be brought by a Patron against the Parson, in order to restrain him

from committing Waste upon the Glebe.

How far a Patron may have a Prohibition to restrain the Parson from committing Waste upon the Glebe.

If a Prebendary commits Waste in his Prebend, the Patron may have a Prohibition.

11 Rep. 49.

If a Bishop commits Waste in his Bishoprick, Remedy lies by Prohibition out of Chancery.

that the Patron may have a Prohibition in the Courts of Common Law, in a Case of this Nature. So if a Prebendary commits Waste in his Prebend, it appears in the same Case, that the Patron may have a Prohibition. In the same Case it is taken Notice of, that the Bishop of *Durham* committed Waste in his Bishoprick, upon which Occasion redress was applied for to the Parliament holden at *Carlisle*. The Answer that the Parliament made was, "Let him be forbidden by Writ out of the Chancery, that neither he nor his Servants commit Waste in the Premises."

His Lordship said, That that Resolution of the Parliament was agreeable to the Reason of the Cases before-mentioned, namely, that as in the former Cases where private Persons are Patrons, the Remedy for them is by Prohibition; so in Cases of Bishopricks, where the King is Patron, there ought to be the like Remedy by obtaining a Prohibition out of Chancery. In 3 *Roll. Abridg.* 83. there are three or four Instances, wherein Prohibitions have been granted in the Case of Waste committed by Ecclesiastical Persons. A Prohibition was the ordinary Remedy for Waste at the Common Law, and on that Ground it is that Injunctions of that Kind are granted in this Court; for these Reasons his Lordship said, that with regard to the Nature of the Case 'tis extremely certain, that the Patron may have an Injunction. The only remaining Doubt relates to the Affidavit. And his Lordship's Opinion was, that that was certain enough, by Reason of the Reference that it has to the Bill. And so his Lordship was pleased to order accordingly.

When an Affidavit is made in order to obtain an Injunction to restrain

Waste, where the Affidavit shall be said to be certain enough.

Burton and Maloon.

March 19.

THE Bill set forth, that in 1733 *Mary Burton* became a Widow, and was seised at that Time of a real Estate of Inheritance of above 300 *l. per Ann.* That *Richard Maloon* at that Time paid his Addreses to her, and actually ingaged to marry her; but that his Father lived in *Ireland*, and under Pretence that he might the sooner be reconciled to the Match, that *Edmund* his Brother persuaded her to sell an Estate, and to lay out 4000 *l.* Part of the Money in the Purchase of a Place in the Chirographer's Office, for the Benefit of *Richard* for his Life, and that she accordingly did so. That after this the Father of *Richard* came from *Ireland* to *Scarborough*, and that *Richard* went to him under Assurances of endeavouring to gain his Consent, but that he returned with his Father to *Ireland* and there married another Lady, and that he never returned to *England* again.

The Bill charged, that *John* the youngest Brother was in the same Combination, that he went to *Ireland* in 1735, and never returned since, and that *Edmund* went in *August* last, in order to settle there.

Thereupon the present Bill was brought by *Mary Burton* against *Richard*, *Edmund* and *John*, in order to have a Satisfaction for the Injury that was done her.

Hacket, who was her Solicitor, made an Affidavit, that he verily believed the three several Defendants retired into *Ireland*, in order to avoid being served with the Process of this Court, and thereupon he obtained an Order at the Rolls, upon a Petition founded upon the Statute of 5 *Geo.2.* that the Bill might be taken *pro confesso*. *John* only appeared to this Bill.

When a Defendant applies to discharge an Order which was made upon the Stat. of 5 Geo. 2. where it shall be necessary for him to make an Affidavit, denying the Charge in the Bill, in order to shew, that he did not withdraw himself, to avoid being served with the Process of the Court.

On the last Day of Petitions, an Application was made to the Court, praying that this Order might be set aside. That Application was grounded upon several Affidavits, setting forth, that the Defendants did not retire into *Ireland* for the Sake of avoiding the Process of this Court, but merely for other Reasons. When that Application was made, the Court thought it was proper, that the Defendants should make Affidavit in Answer to the Substance of the Charge in the Bill, in order to shew, that they did not go into *Ireland* to avoid the Process of the Court. At the same Time they gave Liberty to the Plaintiff to produce Affidavits in Support of the Charge in the Bill. But made it Part of the Order that those Affidavits should be filed within a Week's Time.

Where the Court directs, that Affidavits shall be filed on both Sides by a certain Day, and

some of the Affidavits on one Side happen not to be filed on that Day, it is the established Rule of the Court, not to enlarge the Order farther, that the other Side may be required to give an Answer to those Affidavits.

This Matter now came on again, and *Edmund* made an Affidavit, whereby he fully denied the whole Charge of the Bill, with regard to himself. *John* denied it likewise. Some little Doubt remained as to *Richard's* Denial. However he expressly swore, that he never made her the least Promise of Marriage. In order to contradict him in this Fact, the Plaintiff offered to produce Letters writ by himself, wherein such Promise of Marriage was expressly contained. And Affidavits were produced to shew, that those Letters were writ with his own Hand. But those Affidavits were not sworn within the Time mentioned in the last Order. Upon which it was objected, that they could not be read. On the other Hand it was desired, that the Matter might stand farther over, in Case the Defendants should not admit the Letters to be read; and it was said, that this Court is not tied up to Forms, as the Courts of Law are.

But *Lord Chancellor* was of Opinion, that as the Plaintiff had neglected to verify by Affidavit the Fact of the Letters being Writ by *Richard* within the Time mentioned in the former Order, that she ought to be precluded from doing it on this Motion; and this is the established Rule of the Court; and with regard to the Direction that the Court ought to give in the present Case, his Lordship said, that there was nothing of Difficulty in it, except with regard to *John*, who has entered his Appearance. It has been often held, that Appearance salves Error in Process. And this was so determined by three Judges against one, even in an Appeal of Murder in the Case of *Withrington* and *Charlton*. And the Question will be, whether the Court ought to set aside his Appearance, or not. And if the Appearance had been only irregular, his Lordship said, he should have been of Opinion, that the Appearance of *John* would have salved the Error in the Process. But in the present Case his Lordship's Opinion was, that the Order which was made at the Rolls, was obtained by Contrivance and Male Practice; and it was never determined, that an Appearance would salve a Defect of that Sort. Now with regard to *Hacket*, there has been such a Contrivance and Male Practice proceeding from him in the present Case. For *Hacket* has sworn, that he was informed, and believed, that the Defendants withdrew themselves, in order to avoid the Process of this Court, but has not sworn by whom he received this Information. And was it once allowed that it should be sufficient to make an Affidavit in such a general Manner as is done in the present Case, the Act would be of the most dangerous Consequence that is possible. It appears too, that *Hacket* has sworn this Affidavit without any real Foundation. The Consequence

Where an Appearance is only irregular, the Appearance will salve the Error in the Process. But where an Order which occasioned the Appearance was obtained by Male Practice, the Appearance will not salve the Error in the Process.

Where an Order made upon the Statute of 5 Geo. 2. shall be said to be obtained by Contrivance.

'Tis not

sufficient to be sworn by the Affidavit, that the Party making it was informed and believes, that the Defendants withdrew themselves, in order to avoid being served with the Process of this Court. But it must be set forth by whom the Parties received such Information.

An Order was obtained by Contrivance upon the Statute of 5 Geo. 2. the Defendant appeared to the Bill; and on Application to the Court, they set aside the Order; the Appearance to the Bill must be set aside likewise.

Where a Solicitor shall be committed for obtaining an Order in an undue Manner upon the Statute of 5 Geo. 2.

of these Things is, that the Appearance of *John* must be set aside, and *Hacket* must be committed. With regard to all the Defendants, the Order that has been obtained at the Rolls must be set aside. And so his Lordship was pleased to decree accordingly.

Cases determined at the Seals before *Easter Term* 1741.

April 6.

Moor and Moor.

A Bill had been filed on the Behalf of *Sophia Moor* an Infant, in order that an Account might be taken of the Estate which she was intitled to.

During the Pendency of that Bill *John Peck* of *Watford* in *Hartfordshire* married her, without the Consent of her Guardian, or without the Leave of this Court. *Greenhill* was her Guardian, was well known in the Parish to be such, and she lived with him as his Ward at *Watford* before mentioned.

The Marriage being thus had, *Greenhill* disclosed this Matter to the Court upon a Petition which came on to be heard about a Fortnight ago. When this Petition came on *John* the Husband was order'd to attend. Upon that Attendance he made an Affidavit in Court, " That he went
" to *Doctors Commons* in order to get a Licence, and that
" when he was there, a Person who was Clerk to *Dethick*,
" an Officer in *Doctors Commons*, came out to him, and
" carried him to *Dethick*; when he came before *Dethick*, he
" swore that *Dethick* asked him, Whether the Woman,
" whom he was going to be married to, was of Age? He
" swore, that the Answer that he made him was, that he
" could not tell, and thereupon *Dethick* replied, then she

“ may be of Age, and accordingly filled up his Licence.” This Fact being sworn upon *Dethick*, Lord Chancellor made an Order that *Dethick* should attend; and at the same Time directed that *Yewbank* should attend together with *John Peck* of *Pinner* in the County of *Middlesex*, and *Anne* his Wife; and likewise Mr. *Charles*, who was the Clergyman that married them. These several Persons now attending, the Fact, with regard to each of them, appear’d in the Manner following. As to *Yewbank* he was an Inn-keeper, and lived in the same Town where *Sophia* resided with her Guardian. He owned by his Affidavit, that he had heard she resided in the House of *Greenhill*, but never heard that she was a Ward of this Court. He assisted in conducting her out of *Greenhill*’s House, and gave her away. As to *John Peck* of *Pinner* he was a Relation of *John* the Husband. *John* the Husband, together with *Sophia*, came to his House, and told him, They had an Intention of being married together by Mr. *Charles* in that Church. Mr. *Charles* was not then at *Pinner*, but was at *Watford*, where he was Usher of a School; thereupon *John Peck* of *Pinner* went, with the Rest of them, to *Watford*, in order to find Mr. *Charles*. Before they got to *Watford* Mr. *Charles* was come to *Pinner*; thereupon they return’d to *Pinner*. *John* the Husband, together with *Sophia*, lay at the House of *John Peck* of *Pinner* that Night, and the next Morning they were married. *John Peck* of *Pinner* did not know who *Sophia* was, and was only told, that she boarded at *Greenhill*’s. As to *Anne*, the Fact was nothing but this, that when Mr. *Charles* came to *Pinner* she told him, that the Rest of the Company were gone after him to *Watford*, to desire him to marry the Persons abovementioned; and that when the Company returned she provided Accommodations for them that Evening. As to Mr. *Charles*, the Fact was in this Manner; *John* the Husband, together with *Sophia*, came to him, and desired him to marry them. *Sophia* was dress’d in a mean Apparel, and he knew nothing of her. The Licence was produced to him, and it was in this Form; it im-

powered the Parties to be married at *Busby Watford* or *Aldenham*, and then a Blank was fill'd up with Dots, at some Distance one from another. When the Licence was produced to him, he inserted these Words in it after the Word *Aldenham*, or *Pinner in the County of Middlesex*. There were other Blanks in the Licence, but those were fill'd up by drawing a Line through the blank Places. The Excuse that he made for inserting these Words in the Licence was, that he swore, that by that Blank being only filled up in such a Manner he believed it was the Intention of the Persons granting the Licence, that it might be fill'd up with the Name of any other Parish where the Parties should be married; and that it was frequent for Clergymen to fill up such Blanks in these Licences in that Manner. After he had filled up the Licence he married the Parties, and received a Guinea for what he did. As to *Dethick*, the Charge upon him was to the Purport before set forth. The Answer that he gave to the Charge was this. He admitted that he asked *John* the Husband, Whether *Sophia* was of Age? He swore, That *John* answer'd him, that by her Looks she seemed to him to be about Twenty-four, and thereupon he replied, then she may be of Age. This Affidavit of *Dethick* was confirmed by the Affidavit of two other Persons.

Lord Chancellor said his Opinion was, that *Yewbank* must be committed, but that the other Persons who now attended ought to be discharged. He said the proper Question for his Consideration was, How far the several Persons before mention'd have been criminally concern'd in assisting in this Marriage, so as to incur a Contempt of this Court. For whatever other Offences the Parties may have been guilty of, either against the Statute Law, or the Law of the Ecclesiastical Courts, those are Offences which can only be punishable in other Places. The first Person whose Case is proper to be consider'd is *Yewbank*; it is sworn, That he was an Inhabitant of *Watford*, where the Parties contracting this Marriage lived. He kept a publick Inn
in

in that Town, and as it was generally known there that *Greenhill* was Guardian to the young Lady, it cannot be supposed but that he understood the same; and by his Affidavit he owns, that he had heard she resided in the House of *Greenhill* as his Ward. He was a Party in the Contrivance of carrying her away, for he went with her from *Watford* to *Pinner*, and there he gave her away. 'Tis indeed true, that the giving a Person away is not a Thing essential to a Marriage, but it is a Custom that is usually practised. If *Greenhill* had been a Testamentary Guardian, or Guardian in Socage, the giving her away would have been such an Act for which *Greenhill* might have maintained against him a *Writ of Ravishment of Ward*. *Tewbank* was so deeply concerned in this Affair, that the only Matter of Doubt with regard to him is, whether it is necessary that he should have actual Knowledge that the young Lady was a Ward of this Court. But it has been so often determined, that that is not necessary, that no Question can be made concerning it. The Pendency of a Bill gives Notice to all the World. The next Persons whose Case is proper to be considered, are *John Peck* of *Pinner* and *Anne* his Wife. 'Tis indeed true, that they knew of the Marriage before it was had, and the Intention that there was to complete it, but they were no Parties to the Contrivance of the Marriage; and 'tis not barely the having some Part in the Transactions relating to a Marriage that will make Persons to be guilty of a Contempt of this Court, but they must be in some manner Parties to the Contrivance, to shew that they are in some Degree criminal. These two Persons were Relations to *John* the Husband; they gave them some Provisions when they came to their House, and let them lodge with them. It is sworn, That they did not know who *Sophia* was, and that they were only told she lodged at the House of *Greenhill*. The next Person whose Case comes to

'Tis indeed true, that the Giving a Person away is not a Thing essential to a Marriage, but 'tis a Custom usually observed.

The Giving away in Marriage a Ward is such an Act, for which a Guardian in Socage, or Testamentary Guardian, may maintain a Writ of Ravishment of Ward.

The Pendency of a Bill in the Court of Chancery relating to an Infant's Estate, will so far give Notice to all the World of the Infant's being a Ward of this Court, that the Persons who are concerned in the Marriage of such Infant without

the Leave of the Court, will be guilty of a Contempt.

'Tis not barely the having some Part in the Transaction relating to a Marriage, that will make Persons to be guilty of a Contempt of this Court, but they must be in some manner Parties to the Contrivance, to shew that they are in some Degree criminal.

The Clergy, and likewise the Officers of the Ecclesiastical Court, are bound by the Canons of 1603, tho' the Laity are not.

The 62d Canon in 1603 requires, no Clergyman shall marry any Persons but in the Parish Church where one of those Persons dwells.

be consider'd is Mr. *Charles*. It is very surprizing, that considering the Canons have laid down such particular Rules in relation to Marriages by Licence, that Clergymen should be so very careless in observing them. The Clergy, and likewise the Officers of the Ecclesiastical Court, are bound by the Canons of 1603, though the Laity are not; and yet in these Respects they frequently act in direct Contradiction to them. His Lordship said, that he did not mean in those Instances where they are assisting in clandestine Marriages, for there they are punishable by the Statute Law; but the Instances that he meant was of Marriages under a Licence. The sixty-second Canon is in these Words, "No Minister, upon Pain of Suspension *per triennium ipso facto*, shall celebrate Matrimony between any Persons without a Faculty or Licence granted by some of the Persons in these our Constitutions expressed, except the Banns of Matrimony have been first published three several Sundays or Holy Days, in the Time of Divine Service, in the Parish Churches and Chapels where the said Parties dwell, according to the Book of *Common Prayer*. Neither shall any Minister, upon the like Pain, under any Pretence whatsoever, join any Persons, so licensed, in Marriage, at any unreasonable Times, but only between the Hours of Eight and Twelve in the Forenoon, nor in any private Place, but either in the said Churches or Chapels where one of them dwelleth, and likewise in Divine Service, nor when Banns are thrice asked (and no Licence in that Respect necessary) before the Parents or Governors of the Parties to be married, being under the Age of Twenty-one, shall either personally, or by sufficient Testimony, signify to him their Consents given to the said Marriage." So that the express Words of this Canon require, that no Clergyman shall marry any Persons but in the Parish Church where one of those Persons dwells. The Hundred and second Canon is in these Words; "The Security mentioned shall contain these Conditions; First, That at the Time of granting every such Licence there is not any Impediment of

" Pre-

“ Precontract, Consanguinity, Affinity, or other lawful
“ Cause to hinder the said Marriage. Secondly, That
“ there is not any Controversy or Suit depending in any
“ Court, before any Ecclesiastical Judge, touching any
“ Contract or Marriage of either of the said Parties with
“ any other. Thirdly, That they have obtained thereun-
“ to the exprefs Consent of their Parents, if they be
“ living, or otherwise of their Guardians or Governors.
“ Lastly, That they shall celebrate the said Matrimony
“ publickly in the Parish Church or Chapel where one of
“ them dwelleth, and in no other Place, and that be-
“ tween the Hours of Eight and Twelve in the Fore-
“ noon.” This Canon likewise requires the same Thing
with the former, that the Marriage should be in the Pa-
rish Church which one of the Parties belongs to. The
Hundred and third Canon is in these Words; “ For the
“ avoiding of all Fraud and Collusion in the obtaining of
“ such Licences and Dispensations, we further constitute
“ and appoint, that before any Licence for the Celebra-
“ tion of Matrimony, without Publication of Banns be had
“ or granted, it shall appear to the Judge by the Oaths of
“ two sufficient Witnesses, one of them to be known
“ either to the Judge himself, or to some other Person of
“ good Reputation then present, and known likewise to
“ the said Judge, that the exprefs Consent of the Parents
“ or Parent, if one be dead, or Guardians or Guardian
“ of the Parties, is thereunto had and obtained. And
“ furthermore, that one of the Parties personally swear-
“ eth, that he believeth there is no Let or Impediment
“ of Precontract, Kindred or Alliance, or of any other
“ lawful Cause whatsoever, nor any Suit commenced in
“ any Ecclesiastical Court, to bar or hinder the Proceed-
“ ing of the said Matrimony, according to the Tenor of
“ the aforesaid Licence.” This Canon requires, that be-
fore any Licence shall be granted two Persons shall make

5 M

Oath,

The 103d
Canon of
1603 re-
quires, that
before any
Licence shall

be granted two Persons shall make Oath, that the exprefs Consent of the Parents, or Parent, if one
be dead, or Guardians or Guardian of the Parties, is thereunto had and obtained; but according
to the Practice of making out Licences nothing of this is observed.

'Tis indeed true, that the King can dispense with the Canons, but the Metropolitan cannot.

When a Clergyman marries two Persons whereof one is a Ward of the Court, how far he shall not be guilty of a Contempt by altering the Licence.

It is usual for Clergymen to insert the Names of Parishes where- in Parties are married, even in such Marriage

Licences wherein the Blanks are filled up.

When a Blank is only filled up with Dots at some Distance one from another, how far Parsons may be allowed to insert Words in the blank Places.

Oath, that the exprefs Consent of the Parents, or Parent, if one be dead, or Guardians or Guardian of the Parties, is thereunto had and obtained; but according to the Practice of making out Licences nothing of this is observed. It is a strange Thing to consider, that the Ecclesiastical Courts should get into a Practice so diametrically opposite to the exprefs Words of Canons. One would think that this Practice of making out Licences contrary to the Canons, proceeded from a Notion, that a Metropolitan might dispense with the Canons. And 'tis indeed true, that the King can dispense with them, but the Metropolitan cannot. For which Reason, when there has been Dispensations of this Sort made by the Metropolitan, they have always been confirm'd by the Crown. His Lordship said, that he took Notice of these Things in order to shew, that the Clergy, and the Officers of the Ecclesiastical Court, act frequently in these Cases in direct Opposition to the Canon. And if Mr. Charles has done any Thing wrong by marrying these Persons in a Parish Church which neither of them belonged to, he is to be punished for it in the Ecclesiastical Court, and not in this Court. The only Question which this Court can consider with regard to him is, whether what he has done is a Contempt of this Court or not. The material Charge upon him is, that after the Word *Aldenham* he has inserted in the Licence, or *Pinner in the County of Middlesex*. The Question is, whether this is such an Offence that this Court can take Notice of; or more properly, whether by doing this the Court can consider him as a Party to the Contrivance; and his Lordship's Opinion was, that the Court could do neither of these Things in the present Case. It has been sworn by Mr. Charles, that in these Licences 'tis usual for Clergymen to insert the Name of the Parish-Church which the Parties are married in. And his Lordship said, he believed that what was sworn in this Respect was the Truth. The Blanks in this Licence after the Word

Word *Aldenham* are only filled up with Dots at a Distance one from another ; this in some Measure shews the Intention of the Ecclesiastical Court, that Clergymen should have a Power to fill up those Spaces with the Name of any other Parish where the Parties should happen to be married. It is well known, that Licences to marry, with none of the Blanks filled up, are often left with Clergymen, and they are intrusted to fill up all those Blanks as they shall see convenient. This is a strong Evidence, that even in those Licences where the Blanks are a good deal fill'd up, a Privilege of this Sort of inserting another Parish, where the Parties happen to be married, is permitted. In the present Case, the Reward which Mr. *Charles* received was a very moderate one, and affords Reason to believe, that he did not think he was running any Risque of incurring a Contempt of this Court. On the last Day of Petitions there was another Case something of this Nature, wherein Mr. *Hughes*, who was the Clergyman that married the Parties, was ordered to attend ; but there his Lordship said he did not think it reasonable to commit Mr. *Hughes* ; nor did he think it reasonable in the present Case to commit Mr. *Charles*. As to *Dethick*, he seems to have clear'd himself of the Charge that was against him. He admits his asking *John* the Husband, whether the Person he was going to marry was of Age. But he swears that the Answer that was made him was, that by her Looks she seemed to be about Twenty-four. As this Answer was made him, it was a pretty natural Reply for him to make, *then she may be of Age*. This Affidavit of *Dethick* is confirmed by the Affidavit of two other Persons. And so his Lordship was pleased to order accordingly.

It is well known, that Licences to marry with none of the Blanks filled up, are often left with Clergymen, and they are intrusted to fill up all those Blanks as they shall see convenient.

How far an Officer of the Ecclesiastical Court will not incur a Contempt by making out the Licence, under which a Ward of the Court is married, without the Leave of it.

April 10.

Smith and The Duke of Chandos.

IN 1704 the Patentees of the *Aulnage* Duties made a Lease thereof to Sir *John Smith*, *Hayes* and *Arthur Moor*, in Trust for the Lessees and *Mary Stephens* and *Benjamin Hoskins Stiles*, rendering the Rent of 3138 l. per Ann. On the Day following this Lease the Lessees enter'd into Articles with *Mary Stephens* and *Benjamin Hoskins Stiles*, wherein amongst other Things the Agreement was to the following Effect. One of the Articles was, " That Books
 " be fairly and justly kept of all the Receipts and Pay-
 " ments; and other Matters relating to the said Farm, and
 " that the said Accounts be yearly made up and adjusted
 " within three Months after *Lady-Day*, and that the Pro-
 " fits arising by the said Farm (the aforesaid Rent, and
 " other necessary Charges being first deducted) shall be
 " then, or oftner, divided amongst the several Persons in-
 " terested therein, according to their several Shares, and
 " in case of a Loss the same shall be paid and born by the
 " Parties, their Executors, Administrators and Assigns,
 " according to their respective Shares. That a Treasurer
 " should be appointed within one Month after the Com-
 " mencement of the Lease; that he should receive all
 " Sums of Money arising by the Farm, and that he should
 " pay the same according to the Direction of the Lessees,
 " or the major Part of them, or the major Part of those
 " that should act as Managers." In pursuance of these Articles *Blake* was appointed Treasurer. In 1714 *Arthur Moor* assign'd his Interest in this Lease to *Walcot*, in Trust for the Duke of *Chandos*. By *Blake's* Books of Accounts he had made an Entry, that on *Lady-Day* 1723 there was due to Sir *John Smith* 7 l. 7. d. To *Mary Stephens* 193 l. 6 s. 1/2. To *Hayes* 156 l. 9 s. 2/3. In November 1724 the Lease expired. After the Expiration of this Lease *Blake* made an Entry in his Books to the following Effect.
 " In the Ledger Nov. 26. 1724; wherein the Debtor's
 " Side

“ Side of *Walcot's* Account was enter'd, there were these
“ Words; The 29th of *Sept.* 1725. To ditto, paid *James*
“ *Blake* for eleven Years 550*l.* And an Entry in the
“ same Book, under the Title of Cash of the Partnership,
“ was in these Words, 1725 by *Humphry Walcot, Esq;*
“ 550*l.*” If these Entries had been true, *Walcot*, and consequently the Duke, as he is the *Cestuy que trust*, must have been over paid 295*l.* In 1726 Sir *John Smith* died, and appointed his Son, who was the present Sir *John Smith*, his Executor. *Hayes* died likewise, and made *Blake* his Executor.

In 1727 the Patentees brought a Bill against the present Sir *John Smith*, as Executor of the late Sir *John*; against *Blake*, as Executor of *Hayes*; against *Arthur Moor*, the Duke of *Chandos*, *Walcot*, *Mary Stephens*, and *Benjamin Hoskins Stiles*, in order to be paid 2216*l.* 14*s.* which was in Arrear for Rent.

In 1730 *Arthur Moor* died, leaving *Meese* and *Robert Moor* his Executors.

In 1731 the Cause was heard at the Rolls, and a Decree was made, that Sir *John Smith* and *Blake* should pay to the Patentees the 2216*l.* 14*s.* and that in Case either Sir *John* or *Blake* should pay to the Patentees more than their Proportion of the Money, they should be at Liberty to prosecute the Decree against the other Defendants.

In 1732 an Appeal was had from this Decree, but it was affirmed with this Addition, namely, without Prejudice nevertheless to any Remedy that any of the Defendants might have against each other, or the Representatives of *Arthur Moor*, for their Contribution towards what should be paid, pursuant to the said Decree. *Benjamin Hoskins Stiles* died, and *Francis Hoskins Eyles Stiles* became his Representative. In 1733 *Blake* died insolvent, and *Handford* became his Administrator. On the Death of *Blake*

Lord *Doneraile* took out Administration *De bonis non* with the Will annexed of *Hayes*. The present Sir *John Smith* paid the 2216 *l.* 14 *s.* according to the former Decree; and thereupon in *July* in the same Year 1733. he brought his Bill against the Duke of *Chandos*, *Walcot*, Lord *Doneraile*, *Mary Stephens*, *Francis Hoskins Eyles Stiles*, *Handford*, and against the Representatives of *Arthur Moor*, praying amongst other Things, that the Defendants might contribute their Proportion towards the Money that he had paid in Pursuance of the former Decree.

In 1737 this Cause came to be heard before Lord Chancellor. The Decree amongst other Things directed, that it should be referr'd to the Master to take an Account between the Plaintiff and all the Defendants, except the Representatives of *Arthur*, of all the Dealings and Transactions between them and the Persons they represent upon the Foot of the Articles of 1704, and that the Master should likewise take an Account between the Representative of *Blake* and all the other Parties, except the Representatives of *Arthur*, of what came to his Hands as Treasurer. In 1736 *Mary Stephens* filed her Bill against all the Parties before-mentioned, setting forth a prior Lease of the Aulnage Duty, dated in *Decemb.* 1694, made to Sir *John Smith*, *Hayes* and *Arthur Moor*, in Trust for the Lessees, and *Anthony Stephens*, who was the Husband of *Mary*, and *Benjamin Hoskins Stiles*, that in Pursuance of this Lease Articles were entered into on the 28th of *March* 1695 between the several Parties interested in that Lease; and thereupon, amongst other Things, prayed that an Account might be taken of what was due to her.

This Cause came to be heard before Lord Chancellor in 1739; the Decree amongst other Things provided, that in the Account directed to be taken by the Decree of 1737, each of the Parties to that Account should respectively stand charg'd with any Balance or Sum of Money which remained in their Hands, or in the Hands of any of the

the Partners they represent, more than their own Share of the Profits of the Partnership, under the Articles of the 28th of *March* 1695, which was, or were carried over into the Books of the Partnership, which commenced under the Articles of the 12th of *May* 1704; and if any of such Partners should appear to have been Creditors for any Sum or Sums of Money, under the Articles of the 28th of *March* 1695, which were carried over into the Books of the new Partnership, they were to have an Allowance of such Sums in the Account.

In 1740 the Master made his Report, and thereby the Master charg'd the Duke of *Chandos* with the *Item* of 550 *l.* before-mentioned; and likewise the Master among other Things certified, that there was annually placed to the Credit of each Partner respectively an equal Dividend of Profits arising from the Partnership, and that at the Death of *Blake* there remained due on Account of the Dividend of Profits, which had been allotted to *Lady-day* 1723, and for Management the following Sums, namely, to the late Sir *John Smith* 7 *l.* 7 *d.* to *Mary Stephens* 193 *l.* 6 *s.* 1; to *Hayes* 156 *l.* 9 *s.* 2. For all which Sums the Master was of Opinion, that these respective Parties should be considered as Creditors of *Blake*, and not of the Partnership.

To this Report Exceptions came now on to be argued. One of them was, that the Master ought not to have charg'd the Duke with the *Item* of the 550 *l.* before-mentioned. Another of them was, that the Master was not warranted in being of Opinion, that Mr. *Stephens* and the other Parties last mentioned ought to be considered as Creditors of *Blake*, and not of the Partnership. With regard to both these Exceptions, his Lordship's Opinion was, they ought to be allowed. As to the first of them, he said it was very true, that there was some Obscurity which arose from the Manner of making the Decree in 1737. For if this Question in Relation to the 550 *l.* had then been attended to, the Decree would have been made in another Manner.

When a
Trustee is
decreed to
account, he
shall not be
allow'd to
be examined
as a Witness
in that Cause.

Manner. And if it had been mention'd, that *Walcot* was barely a Trustee, the Account might have been directed to have been taken meerly between the Duke and the other Parties interested in that Account, and *Walcot* not involv'd in that Account. Whereas according to the Decree, as it now stands, *Walcot* is ordered to account as well as the other Parties. The Consequence of which has been, that the Duke has been depriv'd of the Testimony of *Walcot*; but if his Deposition had been allow'd to be read, it would have put an End to the Question easily in Favour of the Duke, and shewn that he could not with any Colour have been charg'd with this Money. But as the Decree stands, his Lordship said he had given his Opinion, that *Walcot* was not a competent Witness; and that it is which has occasioned the present Difficulty. However this Decree must now be taken as it is; and the Court must give such an Opinion as arises from the Evidence of the Entries in the Books of *Blake* and the other Circumstances of the Case; now his Lordship said, that this Question in Relation to the 550 *l.* came only to be material, by Reason of the Insolvency of *Blake*. For if *Blake* had been solvent, so that a Satisfaction for this Money could have been had out of his Estate, there would have been no Occasion to have made this Question, whether *Blake* had a Right to retain this Money to himself, or not. Consider then how the Case stands. *Blake* was a Treasurer of the Partners, for which Reason undoubtedly, as between the Partners, the Entries in the Books are proper Evidence. But in the present Case, the Entries in Question have no immediate Regard to the Partners, they do not import an actual Payment of the Money to *Walcot*; for the Entries are in this Manner; In the Ledger, Nov. 26, 1724, wherein the Debtor's Side of *Walcot's* Account is entered, there are these Words; The 29th of Septemb. 1725, To ditto, paid *James Blake* for eleven Years 550 *l.* and an Entry in the same Book, under the Title Cash of the Partnership, is in these Words; 1725, by *Humphry Walcot Esq;* 550 *l.* So that these Entries implied no more than a Retainer of so much Money

to himself as against *Walcot*. Consider then the Nature of the Objection, it has been said on the Part of the Plaintiff, that these Books are general Evidence; and 'tis indeed true, that if these Entries had imported a Payment to any of the Parties, the Objection might have been of some Sort of Weight. But here the great Difficulty is, that the Entries merely import a Retainer to the Treasurer himself. And his Lordship said, he knew no Case wherein the Court had gone so far as to allow an Entry in a Treasurer's Book to be Evidence for such a Purpose as that. The Objection to allowing the Entries in these Books to be Evidence for such a Purpose as this, is greatly strengthened from the Consideration, that the Entries were made at so considerable a Distance of Time after the Partnership determined. And besides, this Treasurer thinks fit, in a lumping Article, to make a Charge for himself of eleven Years Salary together, at the Rate of 50 *l. per Ann.* But then it has been said, that in Case this Article should be struck off, there is a considerable Sum of Money due from *Blake* to the Duke of *Chandos*, that *Blake* lived till the Year 1733, and that it is very extraordinary, that from the Time wherein the Partnership determined to the Death of *Blake*, neither the Duke nor *Walcot* did ever appear to have made one Demand upon *Blake*; but then on the other Hand it is very observable, that if this Entry was true, *Walcot* must have been overpaid 295 *l.* *Blake* must have been intitled to that Money; and as he was an insolvent Man, it is more extraordinary, that not one Demand was made upon the Duke or *Walcot*, in order to have that Money refunded. It has been said, that *Walcot* resided in the Country, and therefore that there is a reasonable Presumption to imagine, that *Walcot* might undertake that *Blake* be allowed a reasonable Recompence for taking Care of the Interest belonging to the Duke. And it is indeed true, that that is a Circumstance which does deserve some regard to be paid to it. But then how could *Blake* attend and do the Business for *Walcot*? His Lordship said, he could not see what this Allowance could be made for. It has been

When the Entries in a Book kept by a Treasurer merely import a Retainer to the Treasurer himself, for his own Benefit, they shall not be Evidence against the Partners.

urged, that *Blake* had the like Allowance from *Hayes*. But whatever might have been the Inducements for that, the Argument is not conclusive, that such an Allowance ought to be as against the Duke. Upon the whole Matter with regard to this Exception, his Lordship said, that he did not think that there was sufficient Evidence laid before him from which he could charge the Duke with this Sum of Money. He said the proper Thing to have been done would have been to have directed an Issue to have tried this Matter, in Case the directing such Issue would any Ways have answered the Expence of it. But as it was not likely to do so, the right Way is to disallow this Charge at once; and so his Lordship disallow'd it accordingly. With regard to the second Exception, his Lordship said, that the Master had not pursued the Meaning of the Articles of 1704, under which the Partnership was founded. The sixth Clause in the Articles directs, "that Books be fairly and justly kept of all the Receipts and Payments, and other Matters relating to the said Farm, and that the said Accounts be yearly made up and adjusted within three Months after *Lady-day*, and that the Profits arising by the said Farm (the aforesaid Rent and other necessary Charges being first deducted) shall be then or oftner divided amongst the several Persons interested therein according to their several Shares; and in Case of a Lots, the same shall be paid and born by the Parties, their Executors, Administrators and Assigns, according to their respective Shares." The seventh Clause shews this more expressly. For that directs "that a Treasurer should be appointed within a Month after the Commencement of the Lease, for the Receipt of all Sums of Money arising by the said Farm, or any Way relating thereunto, and for Payment of the same, by Direction of the said Parties, or the major Part of them, or the major Part of the Managers;" so that the sixth Article directs, that Accounts shall annually be made up within three Months after *Lady-day*; and the seventh Article directs, that the Treasurer shall pay the Money that shall be due to the Partners, not *ad libitum*, but according

to the Direction of the Partners, or the major Part of them, or the major Part of the Managers; so that it has been truly said, that the Majority of the Partners, or of the Managers, must direct the Dividend before any Thing can be paid out. But contrary to the Intent of these Articles, here has never been an Account made up in any one Year, nor have the Majority of the Partners, or of the Managers, ever given a Direction concerning the Dividend, all of them from Time to Time having only received of the Treasurer Money upon Account. It has been urged, that this general Practice of the Partners amounts to an Evidence of their agreeing to wave this Clause in the Articles, but no such Conclusion can be drawn. But then it has been urged, that by the Transactions that have been in the present Case, there is a reasonable Evidence to think, that by what was done the particular Partners, who are made Creditors for the Sums which have been mentioned, gave a new Credit for them to *Blake*, and therefore they can't now resort to the Partnership Estate. In order to enforce this Objection several Cases have been put; one of those Cases was this. Commissioners of Bankruptcy appoint a Dividend to be made of the Bankrupt's Estate; a Creditor under the Commission neglects to receive of the Assignees his Proportion of that Dividend; the Assignees afterwards break, and run away with the Dividend that was in their Hands, the Creditor shall not be allowed to come upon the Bankrupt's Estate for that Money, but must take his Remedy against the Assignees as well as he can. But that Case materially differs from the present one, for there there was a Sum ascertained by the Dividend, but here there is no Sum liquidated by any Account at all. That Case wholly depends upon the Deed of Distribution made by the Commissioners ascertaining the Dividend; for if no such Deed of Distribution had been made, the Creditor would have been allow'd to have come upon the Bankrupt's Estate, and would not have been

How far a general Practice, inconsistent with a Clause in Articles of Partnership shall not amount to be a Waiver of it.

Where a Partner shall not be said to give a new Credit to another Person, and by that Means to relinquish his Remedy against the Partnership Estate.

Commissioners of Bankruptcy appoint a Dividend to be made of the Bankrupt's Estate. A Creditor under the Commission neglects to receive of the Assignees his Proportion of that Dividend, the Assignees afterwards break and

run away with the Dividend that was in their Hands; the Creditor shall not be allowed to come upon the Bankrupt's Estate for that Money, but must take his Remedy against the Assignees as well as he can.

confin'd to have taken his Remedy againſt the Assignees. Another Caſe has been cited of Part-Owners of Ships. That Caſe was, Suppose there are ſeveral Part-Owners of Ships, and they make up an Account with the Maſter of the Veſſel; the Maſter afterwards fails and runs away with the Money which was in his Hands; one of the Part-Owners ſhall not be allow'd to come againſt the others to have a Contribution in the Loſs which has happen'd to him, and muſt reſort to his Remedy againſt the Maſter. But the Reason of that Caſe depends merely upon there being an Account made up with the Maſter; for if no ſuch Account had been made up it would have been otherwiſe. And ſo his Lordſhip was pleas'd to order accordingly.

Suppoſe there are ſeveral Part-Owners of Ships, and they make up an Account with the Maſter of the Veſſel; the Maſter afterwards fails and runs away with the Money which was in his Hands; one of the Part-Owners ſhall not be allowed to come againſt the others to have a Contribution in the Loſs which has happen'd to him, and muſt reſort to his Remedy merely againſt the Maſter.

April 10.

Batten and Whorewood.

SIR *Nicholas Waite* made his Will, and thereby gave his Eſtate to his Daughters equally between them, but directed, that in caſe either of them ſhould die unmarried, the Share of that Daughter ſo dying ſhould go to the Survivors. At the Time of making his Will Sir *Nicholas* had three Daughters, *Dorothy*, *Anne Jane*, and ——. Sir *Nicholas* died, and ſoon after his Death — died, ſo that *Dorothy* and *Anne Jane* were the only Two that became intitled to the Eſtate. The Eſtate was a large one, conſiſting of about 700*l.* per Ann. in Land, and 30000*l.* in Money. A great Part of the Money was kept in the Hands of *Cox* and *Cleeve* who were Bankers, the Reſt of it conſiſted chiefly in publick Securities. In 1720 they ſold out a conſiderable Part of the Stocks which belong'd to Sir *Nicholas*, and laid out that Money in the Purchase of a Quantity of *South-Sea* Stock. This appear'd by the Books of *Cox* and *Cleeve*; however the particular Sums ariſing from the Sale of theſe Parcels of Stock did not in the Whole appear exactly to tally with the Sum that

was laid out in the Purchase of the *South-Sea* Stock. That Purchase was made in their Joint-Names, but in 1726 they thought proper to make a Division of it into two Moieties, and by that Means one of the Moieties was taken in the Name of *Dorothy*, the other in the Name of *Anne Fane*. This Division they were advised to make, in order that they might more easily receive their respective Dividends. At the Time this Division was made *Anne Fane* was married to *Whorewood*. *Dorothy* made her Will, and gave a Legacy of 300 *l.* to *Batten*, who was her Maid-Servant that lived with her. Of this Will she made *Anne Fane* Executrix.

The present Bill was brought by *Batten* against *Anne Fane* and her Husband, in order to have a Satisfaction for this Legacy.

On the Hearing of this Cause an Account was directed to be taken of the personal Estate which belonged to *Dorothy* at the Time of her Death. But by that Decree it was declared, that no Part of the Capital belonging to Sir *Nicholas* should be considered as Part of her Estate, but that *Anne Fane* was intitled to it under the Clause of Survivorship before mentioned.

On Exceptions to the Master's Report the Question now was, Whether the Moiety of the *South-Sea* Stock, divided as before mentioned, should be considered as Part of the personal Estate of *Dorothy*, so that the Plaintiff could be intitled to have a Satisfaction out of it for her Legacy?

Whose personal Estate a Parcel of Stock shall be said to be Part of.

Lord Chancellor said his Opinion was, that it was not. He said it manifestly appears, that the Stock was bought with the Produce of the Estate of Sir *Nicholas*. The Doubt made by the Plaintiff is, whether this Produce did not consist of Dividends as well as Principal, and consequently whether Part even of the Purchase Money of the Stock did not absolutely belong to *Dorothy*. And 'tis indeed true,

that the Profits, arising from the Estate of Sir *Nicholas* previous to the Death of either of the Parties before Marriage, are not subject to the Clause of Survivorship, as the Capital of that Estate is. In 1720 the Purchase of this Stock was made, and it was made in their Joint-Names. It appears by the Books of *Cox* and *Cleeve*, that at the Time this Purchase was made they sold out several Parcels of other Stocks; and though those Sums do not exactly tally with the Purchase Money of the Stock that was bought, yet if it was not for the subsequent Act that was done of making a Division of the Stock between them, 'tis impossible to imagine that any Part of the Stock could now be considered as the separate Property of *Dorothy*. Afterwards indeed a Division of this Stock was made, and that it is which makes the Difficulty in the present Question. 'Tis sworn by one of the Witnesses, that he advised them to make it for their own Convenience, merely for the Purpose, that they might the better receive the respective Dividends which they were each of them intitled to in this Stock; and that must be taken to be the Reason for making this Division. It has been objected on the Part of the Plaintiff, that Money has no Ear-Mark, and therefore upon that Account the Stock which has been purchased cannot be considered as Part of the Estate of Sir *Nicholas*. This Objection has been enforced by saying, that if an Executor sells Part of a Testator's Estate, and converts the Money into Stock, a Creditor of the Testator shall not be allowed to follow that Money into the Stock wherein it was so converted, and consider the Stock as Assets in the Hands of the Executor, but shall only be allowed to charge the Executor with a *Devastavit*; and undoubtedly that is the general Rule, not only at Law, but in this Court likewise. But there are many Cases wherein that Rule does not hold in this Court, and the Creditor shall be allowed to follow the Stock specifically. And if Stock belonging to a Testator is given by his Will subject to a Contingency, the

How far Money in some Respects may be said to have an Ear-Mark.

When an Executor sells Part of the personal Estate of his Testator, and converts the Money into Stock, how far the Creditors of the Testator may be allowed to follow the Stock into which the Money was converted. If Stock belonging to a Testator is

given by his Will subject to a Contingency, the Court does not presume that the Stock will always remain in the same Plight; and if it is converted into other Stock, the Stock into which it is so converted shall be subject to the same Contingency.

the Court does not presume that the Stock will always remain in the same Plight. And if it is converted into other Stock, the Stock into which it is so converted shall be subject to the same Contingency; and that seems to be a good deal the Nature of the present Case. It has been said, that from the Division which the Parties made of this Stock in 1726 an Evidence arises, that they intended to depart from the Contingency mentioned in the Will of Sir *Nicholas*. But his Lordship said, he could not think that by that Act they did intend to depart from that Contingency. It is not at all natural to believe, that such a Thing was any ways in their Intention; for *Anne Jane* was at that Time married, so that her Estate was not at that Time subject to the Contingency; and consequently, according to this Construction of the Meaning of what was done, *Anne Jane* must have parted with the Chance of a Contingency in the Estate of *Dorothy* for no Consideration at all. 'Tis indeed true, if this had been a mere Estate in Jointenancy, his Lordship said he should have inclined to think that this Act would have amounted to a Severance of the Jointure. But as there was an express Clause of Survivorship, the Act which was done ought not to receive such a Construction. This express Clause of Survivorship has such an Effect in the present Case, that if the Parties had in Writing under their Hands agreed to divide the Estate, yet unless they had agreed to release the Contingency, the Contingency would not have been released. And so his Lordship was pleased to order accordingly.

When Stock is given to two Persons, with an express Clause of Survivorship, how far they shall not be said to intend to depart from that Contingency by making a Division of it.

What Act will amount to a Severance of a Joint-Interest which Persons have in Stock. What shall not amount to a Severance of a Joint-Tenancy in Stock, by reason that it is given with an express Clause of Survivorship.

Ex parte Angle.

April 14.

IN 1731 a very dreadful Fire happen'd at *Blandford* in *Dorsetshire*, and very soon after the Fire great Contributions were voluntarily made in the Counties of *Dorset* and *Somerset* on behalf of the Sufferers. In 1732 a Brief issued on behalf of those unfortunate People. In the same Year

Year 11500 printed Briefs were delivered by the Sufferers to the Managers, appointed by the Statute of 4 *Ann.* 14. *Stanley* was Agent for the Managers in receiving all the Money from them which they used to send to the Sufferers, and in paying that Money to them. And in *London* he was a general Agent in negotiating the whole Affair relating to the Briefs. The Number of the Managers were at first Seventeen, and the major Part of them lived at *Stafford*; they there kept their Office, and likewise the Book which that Act of Parliament directs they shall keep, wherein Entries are to be made of the Number of printed Briefs they receive, of the Times when those Briefs are signed and sent away, to what Parishes and Places, and the Time of the receiving the same back, and the Monies thereon collected. Soon after the Time that the Managers received the Briefs, they circulated them throughout the Kingdom; and shortly after they had so done they received Directions from the Sufferers not to send any Briefs into the Counties of *Dorset* and *Somerset*; but these Directions came too late. By *Easter* 1733 the Managers received from Collections which had been made by these Briefs 6977 *l.* On the 8th of *February* following they sent to *Stanley* 4000 *l.* on behalf of the Sufferers, and he paid the Money to them accordingly. The Managers made no other Payment till the 3d of *July* 1735, and then they paid the Sufferers a farther Sum of 3000 *l.* By the 8th of *August* they had received in the whole 7914 *l.* 7 *s.* 7 *d.* and on that Day they made a farther Payment of 500 *l.*

On the 10th of *March* 1740 a Petition was preferr'd to this Court, on behalf of the Sufferers, against the Managers, and likewise against *Stanley*, complaining, amongst other Things, that the Managers had not deposited with the Register of this Court any of the Briefs, according to the Direction of the Act; and that by the Negligence of the Managers a great Number of the Briefs were never returned, and that they had not duly accounted.

After the Filing this Petition, the Managers brought before the Register and deposited with him 10845 Briefs, and said that they had seventy-three in hand ready to be delivered, so that 582 were not returned at all; and even of those that were returned, there were 629 that had no Money marked upon them. It was sworn on the Behalf of the Managers, that there are always a great Number of Briefs that are never return'd; but it was not proved that there were ever so great a Number missing as in the present Case.

At the Time this Petition was preferred, seven of the Managers out of the seventeen were dead; and it was submitted on the Part of the Survivors, that the Representatives of the Managers that were dead ought to be brought before the Court.

When there are several Managers concerned in a publick Trust, and some of

them die, how far the Survivors shall alone be obliged to account for a Mismanagement of the Trust.

Lord Chancellor said his Opinion was, That it was not necessary to bring those Representatives before the Court, and that an Order for accounting ought to be made against the Survivors; he said, that he did not at all like the Behaviour of these Managers in what they had done. These Managers are to be considered as one Body, and they are each of them answerable one for the other. For which Reason the Objection, in Relation to the bringing the Representatives of the Managers that were dead before the Court, is quite immaterial. It has been said on the Part of *Stanley*, that he at least was by no Means to blame in the present Transaction. For that, as has been urged, he was meerly an Agent for the Managers in receiving and paying their Money for the Sufferers; but *Stanley* ought not to be considered in so confined a Light. For he was generally intrusted with the Management of the Briefs in *London*. Consider then how this Matter stands with regard to the Defendants. By *Easter* 1733, the Managers

How far a Number of Managers shall each of them be answerable one for the other.

How far the
Managers of
Briefs ought
to keep a
Duplicate of
the publick
Book in
London.

received 6077 *l.* On the 8th of *February* following, they only paid 4000 *l.* Part of that Money, and kept the rest of it in their Hands till the 3d of *July* 1735. Then indeed they made another Payment of 3000 *l.* By the 8th of *August* 1736, they had received in the whole 7914 *l.* 7 *s.* 7 *d.* and on that Day it is, that they only make a farther Payment of 500 *l.* There is no great Weight indeed to be laid upon this latter Circumstance; but on the former there is a strong Foundation for charging the Managers with Interest. Then what are the Methods which the Act prescribes, in order to take Care that the Managers act fairly? There are two Methods which it prescribes for that Purpose; first, that a Book be kept by the Managers, wherein Entries are to be made of the Number of the printed Briefs they received, of the Times when those Briefs were signed and sent away, to what Parishes and Places, the Times of the Receiving the same Back, and the Monies thereon collected. This Book the Managers kept at *Stafford*, and perhaps that may not be an improper Place, as that Town is about the Center of the Kingdom. However it would have been proper, that they should have had a Duplicate of this Book in *London*, where the general Resort of People is. For the Act directs, that all Persons shall have free Access to it. The other Method which the Act prescribes is, that the Managers should deposit the Briefs with the Register of this Court, after they are returned to them. But till the Petition was preferred, not one Brief was left with the Register. This is a very extraordinary Neglect in the Managers; and the Words of the Act are, “that if the whole
“ Number of printed Copies of such Briefs so received of the
“ Printer shall not be duly returned, as is hereby required,
“ the Undertaker or Undertakers shall for every printed Copy
“ which shall be found wanting, and not returned as aforesaid,
“ by Default of them, or their Agents, forfeit the Sum of 50 *l.*
“ unless he or they shall make sufficient Proof to the Satisfaction of the Court of Chancery of the said Briefs so wanting
“ being lost or destroyed by inevitable Accident, and of what
“ Money was really and truly collected thereon, and fully

“ account

“ account for and pay the same.” In this Act there is another Clause, and that relates to the Manner of Accounting; the Words of that Clause are, “ That the said Undertaker or Undertakers shall, within two Months after the Monies respectively received, and after due Notice thereof to the Sufferers (who are to be admitted to controvert the same) account before one of the Masters of the Court of Chancery to be for that Purpose appointed by the *Lord Chancellor, Lord Keeper, or Commissioners for the Custody of the Great Seal for the Time being, for all the Monies by them received on Account of such Letters Patents and Briefs, and shall produce before him an exact Account of the respective printed Briefs by them delivered out, and received back and left with the Register as aforesaid, and thereupon the said Master shall proceed to make his Report of what shall be found due on such Account.*” Now in Respect of the Number of

Briefs which the Managers have at last returned, they have only left with the Register 10845; they say indeed, that they have seventy-three more ready to be produced. But even when those are deducted, there are 582 which remain unaccounted for. And of those that are produced, there are 629 which have no Money mark'd upon them at all. This Loss of 582 Briefs is a very great one. And though the Affidavits made on the Part of the Defendants do set forth, that there always is a considerable Number of Briefs which never come back to their Hands, yet they do not pretend to say, that ever that Number was near so great as in the present Case. In order to account for this great Number of Briefs that have been wanting, it has been said, that very soon after the Fire, the Sufferers received great Collections from the Counties of *Dorset and Somerset*, that upon that Account the Sufferers sent Directions to the Managers, that they should not circulate any Briefs into those two Counties, that those Directions came too late, and that that may be a Reason why many of those Briefs were never returned to the Managers. And it is indeed true, that that Reason may account for a great

What shall be said to be a greater Loss in the Number of Briefs than can be accounted for without Negligence in the Managers.

What shall not be said to account for a great Loss in the Number of Briefs that were sent to the Managers.

Part

Part of the 629 Briefs whereof no Money is marked. But it does not seem to account for the 582. And so his Lordship was pleased to order accordingly.

April 14.

Geerish and Donaccon.

THE Plaintiff brought his Bill against the Defendant, and by that Bill pray'd Relief as well as a Discovery; he likewise proceeded at Law in an Action against the Defendant on the same Account. Upon this an Application was made to the Court, that he should make his Election which Court he would proceed in. Thereupon he elected to proceed at Law, but was allow'd to proceed in this Court likewise with regard to so much of his Bill as sought a Discovery; and he amended his Bill on Payment of Costs by Striking out that Part of it which tended to pray Relief.

The Bill was thereupon dismissed of Course, by Reason that it pray'd nothing but a Discovery. The Costs of the Dismission were taxed to the Defendant at 38*l*. But the Plaintiff recovered Judgment against the Defendant in his Action at Law, and those Damages together with the Costs of that Action, amounted to 440*l*.; for those Damages and Costs at Law the Defendant was taken in Execution, and now lay in Custody. But notwithstanding this, he thought proper to take out an Attachment against the Plaintiff for the Costs in this Court.

Where a Person shall be allowed to deduct a Sum of Money for Costs, that were incurred against him in this Court, out of Damages and Costs which he had recovered against the other at Law.

A Petition was thereupon now preferred to the Court on the Part of the Plaintiff, praying, that he might deduct the Costs, which he had incurred in this Court, out of the Damages and Costs which he had recovered against the Defendant at Law.

that were incurred against him in this Court, out of Damages and Costs which he had recovered against the other at Law.

Lord Chancellor said, that the Petition seemed to him to be very reasonable. And if the Precedents of the Court would justify him in granting it, he would certainly do it. But he doubted whether the Practice of the Court would allow of it, by reason that the Bill of Discovery was dismissed out of Court. His Lordship said, he would not make any Order upon this Petition at present, but directed it to stand over, in order that the Plaintiff might search for Precedents.

When a Bill of Discovery is dismissed with Costs, by reason of its praying nothing but a Discovery, how far the Plaintiff shall

not be allowed to deduct those Costs out of Costs at Law which he has recovered against the Defendant.

D E

Termino Paschæ

1741.

In CURIA CANCELLARIÆ.

April 18.

Herne and Herne.

John Herne was a Freeman of *London*, and had Issue three Sons, *John*, *Joseph* and *Benjamin*. *John*, who was the eldest Son, was sent by his Father to make two Voyages, one into the *East-Indies*, the other into the *West-Indies*; when he came back, his Father would have had him make a third Voyage into *Maryland*, but *John* the Son refused to do it, and thereupon a considerable Quarrel arose between him and his Father. The Father turned him out of Doors, and refused to allow him any Maintenance. Upon this he went to his Aunt's, and was there maintain'd about six Months. When the six Months expired, which was in 1716, the Father agreed to allow him an Annuity, for his Life, of 50 *l. per Ann.* upon his releasing all his Orphanage Share, which he would be intitled to on the Death of his Father. Afterwards a Quarrel arose between the Father and *Joseph*. *Joseph* was bred at *Hamburgh*, and his Father remitted him there some Sums of Money. But when he came back from *Hamburgh*, his

Father agreed to allow him an Annuity of 50 *l.* *per Ann.* upon his Releasing all his Orphanage Share which he should be intitled to on the Death of his Father. This last Agreement was made in 1720. *Joseph* married, and had Issue two Sons. *Benjamin* married, and had Issue three Sons and one Daughter. *Benjamin* died in the Life-time of his Father. The Father afterwards made his Will, and thereby gave to his Son *John* a farther Annuity of 100 *l.* *per Ann.* and 100 *l.* in Money. And in Case he should choose to have a Sum in Gros rather than the Annuity which he gave him by his Will, he directed that his Executors should pay him such Sum in Gros as should be a reasonable Compensation for that Annuity, but directed that his Son *John* should give another Release of his Orphanage Share, or else that he should take no Benefit under the Will. By this Will he gave to *Joseph* a farther Annuity of 100 *l.* *per Ann.* and made some other Provision for him. By his Will he gave likewise 2000 *l.* to the Sons of *Joseph*. But directed that neither he nor his Sons should take any Benefit by the Will, unless he should give another Release of his Orphanage Share. By the same Will he gave to the two Sons of *Benjamin* 4000 *l.* a-piece and 3000 *l.* to the Daughter of *Benjamin*. And made the Sons and Daughter of *Benjamin* Residuary Legatees. Of this Will he made *Arnold* and *Lock* his Executors. The Executors had a Legacy given them for their Trouble. After the making this Will, *John* the Father died, and left a personal Estate of about 21000 *l.* He was likewise in flourishing Circumstances at the Time he obtained the Releases from his two Sons which have been mentioned.

The present Bill was brought by *John* the Son against the Children of *Benjamin*, against *Joseph* and his Children, and likewise against *Arnold* and *Lock*, praying to be relieved against the Release which he had given to his Father, and that he might have the Benefit of his Orphanage Share in his Father's Estate.

On

On the Hearing of this Cause, *Joseph* prayed by his Counsel, that he might be relieved against his Release likewise; and, in Case he should be let into his Orphanage Share, made an Offer to set a-part 2000 *l.* of it for the Benefit of his Children. The Plaintiff did not much oppose what was desired by the Counsel of *Joseph*.

Where a Citizen of *London* has turned his personal Estate into real, meerly with an Intent to defeat his Children, the Court has relieved against it.

Where a Citizen of *London* in his Life-time gives Part of his personal Estate to a Child in Marriage, or otherwise by

Way of Advancement, and in Consideration of that the Child agrees to give a Release of his Orphanage Share, such Release shall bind.

Lord Chancellor said his Opinion was, That both these Releases ought to be set aside. He said it was very true, that by the general Law of the Land, a Father is a Judge of the Merit of his Children, and has a Right to dispose of his Property at his Death in such Manner as he shall think fit. But by the Custom of *London*, either as it is a particular Custom in that Place, or as it is a Remain of the antient Common Law, a Father has not this Power, and his Wife and Children are intitled to a Share in the personal Estate, which he leaves behind him. This Custom of *London* has introduced and occasioned various Rules in this Court, to prevent Evasions out of it. And many Cases have been, wherein Acts of a Father have been set aside, as being made in Fraud of the Custom. For which Reason, where a Father has turned his personal Estate into real, meerly with an Intent to defeat his Children, the Court has relieved against it. It is indeed true, that where a Father in his Life-time gives Part of his personal Estate to a Child in Marriage, or otherwise by Way of Advancement, and in Consideration of that the Child agrees to give a Release of his Orphanage Share, such Release shall bind. That was the Case of *Ives* and *Metcalf*. The Reason for that is, that it is for the Benefit of a Child, that he should have a Power to make an Agreement of that Sort; and if he had not, in some Instances the Custom might turn to his Prejudice rather than otherwise. But the present Case is by no Means a Case of that Sort. Here is a Father a good deal Angry with a Son, and perhaps deservedly;

vedly; he sends him two Voyages to the *Indies*, and would have him make a third to *Maryland*. The Son does not think fit to comply with this Request of his Father. Upon this his Father turns him out of Doors, and refuses to give him any Maintenance. The Son goes to his Aunt's, and is there supported for a while, and then he agrees to take an Annuity of 50 *l. per Ann.* and release his Orphanage Share. Under these Circumstances 'tis impossible that this Release should stand, because at the Time of making it the Son appears to be under great Distress. Under such Circumstances as these, if even the Custom was out of the Question, a Release obtained from a Father of his Son would be set aside. Suppose a Father was Tenant for Life, with a Remainder to his Son in Tail, the Father procures the Son to join with him in suffering a Recovery; if the Son was under Circumstances of Distress of this Sort at the Time he suffered this Recovery, the Court would set the Recovery aside. The next Consideration is with regard to the Release obtained from *Joseph*. This Question merely rests between the Plaintiff and *Joseph*. The other Defendants are not concerned in it. And the Plaintiff does not much contend that the Release which was obtained from *Joseph* shall be binding; however, if he did, it clearly would not; 'tis a Release merely given in Consideration of a Sum received for Maintenance, and there never was an Instance wherein it was held, that a Release of that Sort should be a Bar to the Share which a Child was intitled to under the Custom, because a Father is by Nature, and by the Law of the Land bound to maintain his Children. Nor ought the Money, which *Joseph* received under this Agreement with his Father, to be brought into Hotchpot, though the other Sums which *Joseph* received by Way of Advancement ought. And so his Lordship was pleased to decree accordingly.

Suppose a Father was Tenant for Life, with a Remainder to his Son in Tail, the Father procures the Son to join with him in suffering a Recovery; if the Son was under Circumstances of great Distress at the Time he suffered this Recovery, the Court would set the Recovery aside. When a Release of an Orphanage Share is given merely in Consideration of the Child's receiving Maintenance Money, such Release shall not be binding.

Sums of Money, which a Child receives of his Father who is a Freeman of *London* by Way of Maintenance, shall not be brought into Hotchpot.

When an
Executor
has a Legacy
given him,
where he
shall abate in
Proportion
with the other Legatees.

N. B. As his Lordship was of Opinion, that the Release ought to be set aside, and consequently that *John* and *Joseph* were each of them intitled to their Orphanage Share; it was said, that the dead Man's Share would not be sufficient to answer all the Charges upon it; for which Reason it was urged, that the Executors ought to abate in Proportion with the other Legatees; and *Lord Chancellor* inclined to think that they ought. *Vide the next Case.*

April 22.

Herne and Herne.

Ante 430.

THE Attorney General now said, that since the Hearing of this Cause he had found a Case whereby it appears, that under the Circumstances before mentioned the Executors ought not to abate in Proportion. It was the Case of *Newton* and *Howton* the 28th of October 1734 at the Rolls. That was a Bill which was brought to have an Account of a Testator's personal Estate, and to be paid a Legacy. The Testator there by his Will had given to one of his Executors a Legacy of 1000*l.* and to another of them a Legacy of 400*l.* He directed by his Will, that his Executors should each of them retain those Legacies out of his Estate. By the same Will he gave another Legacy of 50*l.* to one of his Executors, and directed that he should have that Legacy for his Care and Pains. The personal Estate prov'd deficient to satisfy all the Legacies; but it was insisted on the Part of the Executors, that they ought to retain the Whole of their Legacies notwithstanding.

On the Hearing of this Cause his Honour was of Opinion, that with regard to the Legacies of 1000*l.* and 400*l.* the Executors ought to abate in Proportion with the other Legatees. His Reason was, that in general Executors must abate as well as other Persons, and though the Testator has directed that the Executors should retain those Legacies out of

of his Estate, yet that was no more than the Law implies. But with regard to the other Legacy of 50*l.* his Honour was of Opinion, that the Executor ought to have the Whole of it, and should not abate in Proportion with the other Legatees. His Reason for that was, that the Legacy was given him for his Care and Pains, and the Executor having acted, he deserved the Legacy which was given him.

His Lordship said, that he would consider of the Case which had been cited, and directed that a Copy of it should be laid before him. *Vide the next Case.*

Herne and Herne.

April 24.

LORD Chancellor now said, that he had considered of the *Ante 434.* Case which had been cited, but still he remain'd of his former Opinion. In 2 *Peer Williams* 25, there is a Case directly contrary to the Case which has been cited; and that a Case too determined by the same Judge who determined the former. There was a Legacy of 60*l.* a-piece given to Executors for their Care and Pains. It was urged, that on that Account the Legacy ought to be considered as a Debt, and that therefore the Executors ought not to abate in Proportion with the other Legatees. But the Words of the Book are, *Per Cur. The Executors, if they please, may renounce, and the Legacies to them are but Legacies, and shall abate in Proportion. It cannot be a Debt, in regard that can never be a Debt to the Executors which was not so to the Testator.* And in 2 *Vernon* 434. there is a Note to the like Purpose. His Lordship said, that the Resolutions of these two Cases which he had cited fell in with his own Opinion, because he thought that where a Legacy is given to Executors for Care and Pains, 'tis wrong that that Case should receive a different Determination from the Case of a Legacy being given to Executors generally, in which it is admitted, that the Executors ought to abate in
Propor-

When a Legacy is given to an Executor, and the Words of the Will declare that it is for his Care and Pains, these are rather the Words of the Scrivener and Drawer of the Will, than of the Maker of it. What shall be said to be too slight a Difference between two Cases to found a Distinction. What shall be said to be a Legacy and not a Debt.

Proportion with the other Legatees. And where a Legacy is given to Executors generally, it is understood to be for their Care and Pains; and when these Words are expressed in the Will, declaring that the Legacy is given them for their Care and Pains, they are rather the Words of the Scrivener, and Drawer of the Will, than of the Maker of it; for which Reason the making a Difference between the one Case and the other, would be to make a Distinction on too slight a Foundation. And though the Bequest is expressed to be for Care and Pains, yet still it is but a Legacy which must proceed from the Bounty of the Testator. 'Tis not to be considered as a Debt or Contract, for the Care and Trouble of the Executor is only the Motive on which the Testator exercises his Bounty by way of Legacy; and let the Motive of the Bounty be what it will, whether past and executed, or future and executory, it is all the same. An Executor, when he proves the Will, may be supposed in some Measure to know the State of the Testator's Affairs. And if he does prove the Will, he takes the Legacy subject to the Contingency of abating in case the Estate proves deficient. His Lordship said, that on the Hearing of the Cause he had given a Direction in the Decree agreeable to this Opinion; and therefore that Direction must stand.

April 18.

. Codrington and England.

DAME *Elizabeth Codrington*, and several other Persons, who were Owners of Lands in the Parish of —, wherein was a Right of Common belonging to certain of the Inhabitants, made several Inclosures of them. *John* and *William England* brought eight Actions against them upon that Account.

The present Bill was thereupon brought by Dame *Elizabeth Codrington*, who was Tenant for Life, and by Sir *William* her Son, who was Remainder-Man in Tail, and likewise

wife by the several other Owners who had made Inclosures of these Lands, against *John* and *William England*, setting forth, that they had a Custom to inclose these Lands, and praying, amongst other Things, that this Custom might be established, and that the Testimony of their Witnesses might be perpetuated.

When this Cause came to be heard, the Court directed an Issue to try the Custom; that Issue was accordingly tried, and a Verdict found in Favour of the Custom.

The Cause came now on again on the Equity reserved, and relating to the Matter of Costs.

Lord Chancellor said, That with regard to the Costs at Law 'tis extremely clear that they must be paid by the Defendants; the only Doubt is with regard to the Costs in this Court, and his Lordship's Opinion was, that even these Costs must be paid by the Defendants. His Lordship said, that as to these Costs he thought the Matter a little doubtful at first, but all Circumstances considered, the Plaintiffs must be intitled to them. Had this been a Bill merely brought to perpetuate the Testimony of the Plaintiffs Witnesses without praying any Relief, though the Defendants had examined Witnesses themselves, the Plaintiffs would not have been intitled to their Costs. But the present Bill is not barely brought to perpetuate the Testimony of the Plaintiffs Witnesses, but it is brought for Relief likewise in order to have the Custom of inclosing established; however, in case the Defendants had only brought one Action in order to have tried the Right of inclosing, his Lordship said, he should not have thought that the bringing the present Bill was necessary, and consequently the Plaintiffs would not have been intitled to these Costs. But in the present

If a Bill is brought merely to perpetuate Testimony, though the Defendants examine Witnesses themselves, the Plaintiffs will not be intitled to their Costs. A Person incloses Land in a Town under a Custom for that Purpose, another

5 T

Case

brings an Action against him in order to try that Right; a Bill is thereupon brought in order to establish the Custom. An Issue is directed in that Cause to try the Custom, and found against the Defendant, yet the Plaintiff shall not have the Costs which were incur'd in the Court of Equity.

Several Persons inclose Land under a Custom for that Purpose, another brings eight Actions against them on that Account. A Bill is thereupon brought to establish the Custom and to stay the Proceedings in those Actions. An Issue is directed in that Cause to try the Custom, and a Verdict found in Favour of it; the Defendants shall pay the Costs in Equity as well as at Law.

On a Bill
that is
brought to
restrain Mul-
tiplicity of
Actions,
where the
Defendants
shall pay the
Costs.

Cafe the Defendants thought proper to bring eight Actions at Law against the Plaintiffs upon the Account of their Inclosing, and put the Plaintiffs under a Necessity to bring their Bill, in order to put a Stop to this Multiplicity of Actions. The bringing this Number of Suits was most vexatious in the Defendants, and for that Reason they ought to pay the Costs in this Court as well as at Law. There is the more Reason for making them pay these Costs, because one of the Defendants enjoys some Lands which his Mother inclosed under this Custom, and other Lands which he inclosed himself. And so his Lordship was pleased to decree accordingly.

April 20.

Cooper and Pepys.

REEVES was a Goldsmith and Jeweller, and *Andrees* dealt in Jewels likewise. By this Means *Reeves* and *Andrees* had a Correspondence together. *Reeves* was indebted to *Andrees* in 489 *l.* however *Andrees* was in worse Circumstances than *Reeves*, and in order to give him a Credit *Reeves* lent him various promissory Notes payable at future Days, amounting in the Whole to 4600 *l.* and upwards. These Notes were drawn by *Reeves* and lent without any Consideration. *Pepys*, *Beach* and *Timbrel*, discounted these Notes for *Andrees*, and all the other Notes were indorsed by *Andrees* to different Persons for a valuable Consideration. At the Time these Notes were discounted the Persons that discounted them had no Notice of their being lent to *Andrees* without any Consideration; nor had the Persons, to whom the Rest of them were indorsed, any Notice of this at the Time of the several Indorsements.

In June 1735 *Andrees* went into *Holland* in order to secrete himself from his Creditors, and thereupon a Commission of Bankruptcy issued out against him. Upon this Occasion *Reeves* got Intelligence that some of his Notes were discounted by *Pepys*, *Beach* and *Timbrel*, and thereupon

on he informed them that these Notes of his were merely lent to *Andrees* in order to give him a Credit, and that they were lent him without any Consideration. He told the same to —, whom one of these Notes was indorsed to; — advised him to go into *Holland* after *Andrees*, to endeavour to get a Satisfaction from him for making this Use of these Notes. Accordingly *Reeves* did go into *Holland* after *Andrees* for that Purpose; however, his going there was of no Service to him, but on the contrary, a Commission of Bankruptcy was taken out against him likewise. Under that Commission *Pepys*, *Beach* and *Timbrel*, together with *Smith*, were chosen Assignees, *Pepys*, *Beach* and *Timbrel* being Creditors of him by the Notes which they had so discounted, and *Smith* being a Creditor of him upon another Account. *Reeves* came back into *England*, and surrender'd himself; however *Andrees* continued in *Holland*, and did not surrender himself within the Time that the Statute of 5 *Geo.* 2. prescribes.

On Application to the Court the Time for his Surrender was enlarged; during the Enlargement of it *Abrahams* and *Israel*, two Friends of *Andrees*, applied to the Assignees under the Commission of *Reeves*, to get the Creditors of *Reeves* to meet together in order to consent, that the Assignees might make a Composition with *Andrees* for the Money that he owed *Reeves* on the Account of these Notes.

The Assignees gave Notice in the *Gazette* to the Creditors of *Reeves*, that a Meeting would be had for such Purpose on the 12th of *August* 1735. At that Meeting none of the Creditors of *Reeves* were present whom the Notes before-mentioned were indorsed to; however there were several others of his Creditors present whom he owed Monies to on other Accounts. At that Meeting the Creditors who were present asked of the Assignees of *Reeves*, whether *Andrees* proposed to make a Composition for the Whole of the Notes? The Answer which they made them was, that he did, and thereupon they signed an Agreement, impower-

impowering the Assignees to make a Composition with *Andrees*, or with any other Person that was indebted to *Reeves*. *Cooper* and *Bolton* were two of those Persons.

On the 3d of *September* following *Andrees* and the Assignees of *Reeves* came to a Composition together. A Deed of Composition was made for that Purpose; and the Purport of the Deed was, "That *Andrees* should pay to the Assignees of *Reeves* 6 s. in the Pound for the whole Sum of 4600 l. and upwards, for which the Notes before-mentioned were given." *Andrees* likewise by this Deed released his Demand which he had upon *Reeves* for the 489 l. In Consideration of this it was agreed on the Part of the Assignees, that the Commission against *Andrees* should be superseded, and that the Creditors of *Reeves* should release all Kind of Demands which they had against *Andrees* upon the Account of these Notes. But the Deed expressly provided, that such of the Creditors of *Reeves* who had either discounted these Notes, or whom they were indorsed to, should be at Liberty to take their Satisfaction out of the Estate of *Reeves* for the remaining Part of the Money. *Pepys*, *Beach* and *Timbrel* executed this Deed of Composition, but *Smith* refused to do it. In pursuance of this Deed of Composition the 6 s. in the Pound, amounting to about 300 l. was paid by *Andrees* into the Hands of *Pepys*, and the Commission against *Andrees* was superseded. Releases likewise were given to *Andrees* by the several Persons who discounted some of the Notes, and by those to whom the Rest of them were indorsed. All the Debts of *Reeves*, except what were owing on the Account of these Notes, did not amount to more than 600 l. *Beach* died, and *Timbrel* became a Bankrupt.

The present Bill was brought by *Cooper* and *Bolton* against the Assignees of *Reeves*, and their Representatives, and likewise against the several Persons who were Creditors of *Reeves*, on the Account of these Notes, setting forth, amongst other Things, that *Andrees* was able to make a

better Composition with the Assignees at the Time of making this Deed, that the Deed of Composition was unequal in itself as between the Creditors of *Reeves*, by Reason that by that Deed the Creditors under the Notes were left to take all the remaining Satisfaction for these Notes out of the Estate of *Reeves*; and yet that the other Creditors had no otherwise a Benefit by this Deed, than by having 6 s. in the Pound paid off in the Manner before-mentioned. Whereupon the Bill prayed, that the Deed of Composition might be set aside even against *Andrees*, that at least with regard to the Assignees the 6 s. in the Pound might be brought into the Estate of the Bankrupt, and distributed equally among all his Creditors, or that those Creditors under the Notes might not come in for a Satisfaction of the remaining 14 s. in the Pound out of the Estate of *Reeves*, and that a general Account might be taken of *Reeves's* Estate.

Lord Chancellor said his Opinion was, That the Bill ought to be dismissed, and even with Costs. He said the only material Part of Relief for which there is any Colour or Foundation, is that which prays, that as against such of the Assignees and their Representatives, who were Creditors under the Notes by Discounting them, and likewise as against the other Creditors under the Notes, the 6 s. in the Pound might be brought into the general Estate of the Bankrupt; but even as to that Part of the Bill, there is no Foundation for it. The Ground upon which this Relief is founded, is a Suspicion that those Assignees which signed the Deed of Composition, have acted unequally in taking more Care of themselves and the Rest of the Creditors under the Notes, than they have done of the other Creditors. But his Lordship said, that what the Assignees had done appeared to him to be a fair Transaction. The Nature of the Case is no more than this; *Reeves* had drawn these Notes payable to *Andrees*. The Assignees that signed this Deed had discounted some of them, and the rest of them were indorsed to the other

Where a Sum of Money, which is agreed to be paid under a Composition with the Debtor of a Bankrupt, shall not be brought into the general Estate of the Bankrupt.

Defendants. It has been said, that *Reeves* lent these Notes to *Andrees* in order to give him a Credit, and that he did this without any valuable Consideration. But be that as it will, those that discounted the Notes, and likewise those whom the Notes were indorsed to, had no Notice that the Notes were lent in the Manner that has been mentioned, at the Time the Notes were discounted and indorsed. For which Reason it is certain, that those that discounted the Notes, and those that the Notes were indorsed to, had their Remedy both against the Drawer and the Indorfor. Judgment in an Action at Law might have been had against both of them, and even Execution against both till the Parties had received a compleat Satisfaction. But it happened in the present Case, that the Drawer and Indorfor both became Bankrupts. However they were each of them Parties to the Deed of Composition. *Andrees* had withdrawn himself into *Holland*, carried there almost all his Effects; and the Consequence is, that if it had not been for this Deed of Composition, no Satisfaction for these Notes would probably have been obtained from *Andrees*; but the Estate of *Reeves* would have been liable to have made Satisfaction for the Whole. Under these Circumstances the Agents for *Andrees* made a Proposal to the Assignees of *Reeves* to get the Creditors of *Reeves* to meet, in order that a Composition might be made. The Assignees published an Advertisement, giving Notice to the Creditors to meet on the 12th of *August*; a Meeting was had accordingly. It is indeed true, that at that Meeting there were only a few of the Creditors present, but it was their Fault that more of them did not meet. The Act does not require that any certain Number of the Creditors should be present. And the Majority of those that are present have a Power to assent or dissent to the Assignees making a Composition. The Majority of those that were present did consent, that the Assignees should have a Power to make a Composition. And 'tis not material to inquire, whether the Composition which was made was a reasonable

able one, or not. It is enough to say, that it was made under a proper Authority. But his Lordship said, that he would deliver the Cause from any Objection of that Sort against its being a reasonable Composition, and would declare his Opinion, that he thought it a very reasonable one. For tho' it is very true, that by this Deed of Composition, the Estate of *Andrees* is intirely discharged from these Notes; yet in all Events the Estate of *Reeves* has this Advantage from it, that with regard to 6 s. in the Pound, it cannot be charg'd with these Notes. This is an Advantage which the general Creditors of *Reeves*, who were not Creditors under these Notes, received from this Composition. The Assignees cannot be charged with any Fraud in what they did. The only Colour for such Fraud is, that before the Creditors consented to their making a Composition, the Creditors asked the Assignees, whether *Andrees* proposed to make a Composition for the whole of the Notes. The Answer that they made them was, that he did. It has been urged, that this Answer implied, that *Andrees* proposed to make a Composition that should go in compleat Discharge of the Notes; but the Answer does not imply this. The Answer which was made, means no more than that *Andrees* proposed to make a Composition which should include all the Notes; and that the Composition did. With regard to the other Parts of the Relief prayed by the Bill, there is no Colour for them. One of them is, that the Deed of Composition may be set aside even against *Andrees*. As to that Part of the Relief, there is no Pretence for it. No Proof is made in the present Cause, that *Andrees* made any Misrepresentation of his Estate at the Time the Composition was made. As to the remaining Part of the Relief, it prays, that an Account might be taken of the Estate of *Reeves*, and that a Distribution may be made of it amongst his Creditors. But there is no Pretence for that Part of the Relief neither. Relief of that Sort is proper to be had on an Application to Commissioners of Bankrupts, and is not proper to be had

Where Assignees shall not be said to be guilty of a Fraud in the making a Composition with the Debtor of a Bankrupt.

How far a Bill will not lie for a Distribution of a Bankrupt's Estate.

had on a Bill in this Court. And so his Lordship was pleased to decree accordingly.

April 21.

Lockyer and Vade.

Thomas Diffyn died intestate, and on his Death left a Wife and several Grandchildren, who were the Children of his Daughters. These Grandchildren were his next of Kin, the Daughters all dying in his Life-time.

The present Bill was brought, in order, amongst other Things, to have an Account of the personal Estate of Diffyn.

On the Hearing of this Cause the only Question was, whether the Grandchildren should take *per Capita* or *per Stirpes*.

Lord Chancellor said, That he would not determine this Point till the Account of the personal Estate of Diffyn was taken by the Master, it being suggested, that it was likely to turn out, that there would be no Surplus at all for the Benefit of the Grandchildren. But his present Opinion was, that the Grandchildren in this Case ought to take *per Stirpes*,⁺ and not *per Capita*. It is indeed true, that in collateral Successions the Representatives shall take *per Capita*, and not *per Stirpes*. And that Point has been determined in three Cases, two of which have been in this Court, the other in the Court of Exchequer. But his Lordship said, that at present it seemed to him, that there was a Difference in this Respect between the Case of lineal and collateral Successions. The Words of the Statute of Distributions are, "That the Ordinaries and Judges respectively shall
" and may, and are enabled to proceed and cause such Ad-
" ministrators to account for and touching the Goods of
" any Person dying intestate, and upon Hearing and due
" Con-

Where
Grandchil-
dren shall
take *per*
Stirpes, and
not *per Ca*-
pita.

How far in
collateral
Successions
the Parties
shall take
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and not *per*
Stirpes.

+ It is so by the
Civil Law. See
Harr. Justinian
End. of 11th Inst.
See in his note
on 1st 11th Inst.
at the end of
the book.

Mr. Jodrell's Notes.

Easter Term 14th Geo 2. - 1741

Lockier & Wade

J. C. Barnes. The Question in this cause was where a
Ch. Rep. grandfather dies leaving a widow & grand-
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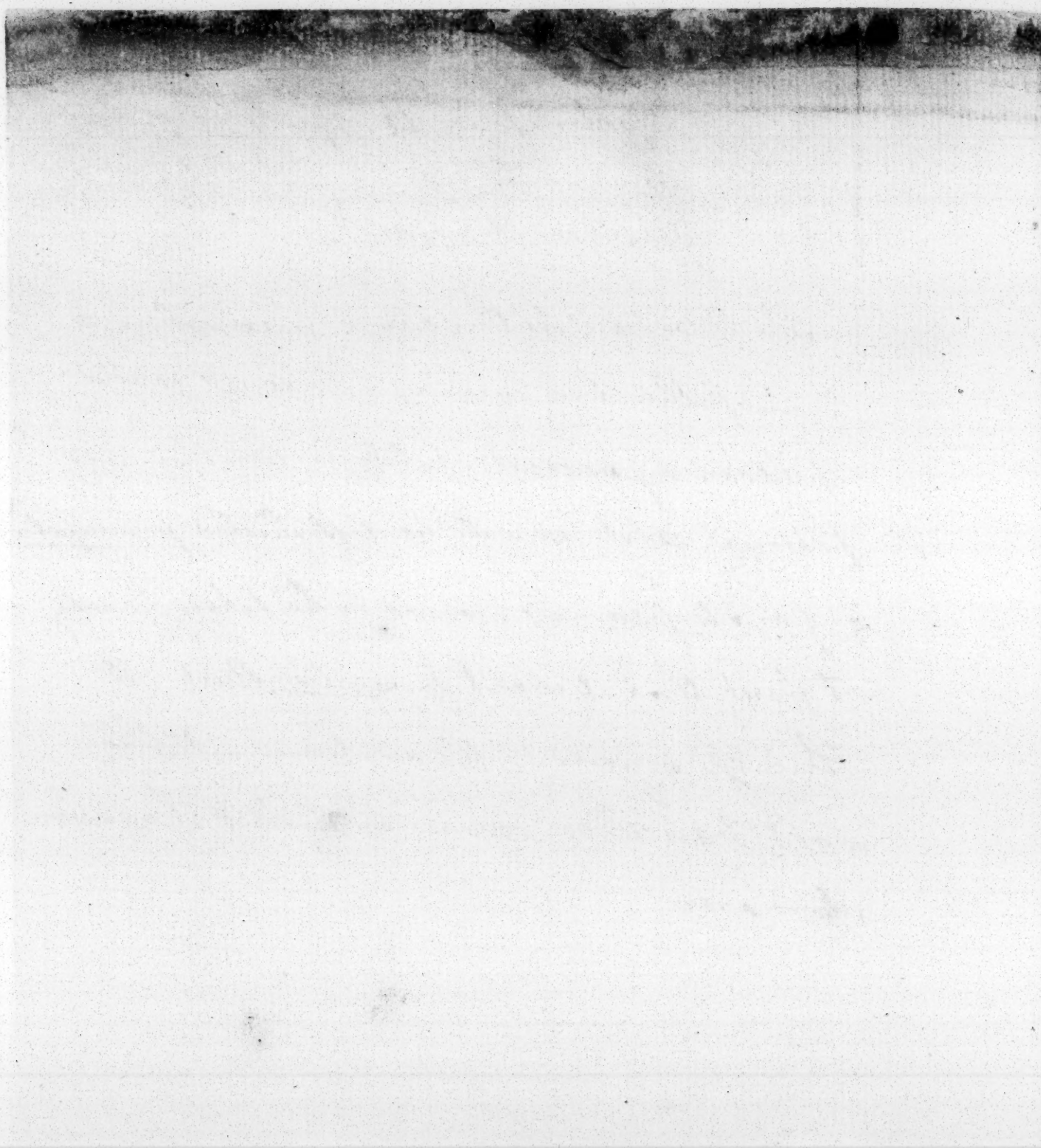
+ It is so by the
Circumstances
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End. of ~~the~~ *fact*
See in his note
on 4th 110th *How*
at the end of
the book.

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“ Consideration thereof, to order and make just and equal
 “ Distribution of what remaineth clear after all Debts,
 “ Funerals, and just Expences of every Sort first allowed
 “ and deducted, amongst the Wife and Children, or Chil-
 “ dren’s Children, if any such be, or otherwise to the
 “ next of Kindred to the dead Person in equal Degree,
 “ or legally representing their Stocks *pro suo cuique jure*,
 “ according to the Laws in such Cases, and the Rules and
 “ Limitations hereafter set down.” But it happens that
 there is no such Rule after set down in the Statute with re-
 gard to lineal Successions; for which Reason it must depend
 upon the Rules of Law in such Cases. It has been argued
 at the Bar with a great Deal of Reason, that if this Distinc-
 tion was not to take Place, Relations that were more re-
 mote to the Intestate might run away with a greater Share
 of the Estate of the Intestate than nearer Relations. For
 it might happen that there might be three Children of an
 Intestate, who might each of them have a Child; one of
 those Grandchildren might have several Children; and if
 this Distinction was not to prevail, the Great-Grandchil-
 dren would have a better Share of the Estate of the Inte-
 state than the Grandchildren. But this Objection cannot
 hold with regard to collateral Successions, for the Statute
 expressly provides, that there shall be no Representations
 admitted among Collaterals, after Brothers and Sisters Chil-
 dren. His Lordship said, that these were his present
 Thoughts upon this Matter, tho’ upon the Opening of this
 Cause he inclined to be of a contrary Opinion. However,
 as he said before, he would not determine this Point at
 present; but would reserve the Consideration of it till af-
 ter the Account should be taken.

Llevellyn and Mackworth.

July 17.
1740.

Mc *f.c. 2. Alk. 40 - but points a time different.*

IN 1655, Thomas Llevellyn being possessed of two Lease-
 hold Estates, holden of Sir Richard Cromwell and of an-
 other, made a Settlement thereof to the following Effect.
 “ The Settlement took Notice that a Marriage was intend-

“ ed to be had between *John Llevellyn* and *Margaret* his
 “ Wife, and thereupon, in Consideration thereof, and in
 “ Part - Performance of Articles before that Time had,
 “ *Thomas Llevellyn* settled the same in Trust for the Bene-
 “ fit of himself for Life, the Remainder to *John Llevellyn*
 “ and the Heirs of the Body of *Margaret* by *John* begot-
 “ ten, the Remainder to the Heirs, Executors and Admi-
 “ nistrators of *John*.” *Thomas* died, and after his Death,
John in 1693, being seised of a Fee-simple Estate which
 he had a Power to dispose of, and of a Leasehold E-
 state holden of the Earl of *Pembroke*, which he had a
 Power to dispose of, and being possessed likewise of the
 two Leasehold Estates before-mentioned, holden of Sir
Richard Cromwell and of another, whereof he had no
 Power to dispose, made a voluntary Settlement of his
 whole Estate to the following Effect. “ The Consideration
 “ of the Deed was recited to be the Settling the Estates of
 “ *John* amongst his Sons, as the Estates lay most conve-
 “ nient, and thereupon the Estates were vested in Trustees
 “ to permit *John* to enjoy all of them during his Life;
 “ the Remainder, as to the Freehold Estate and the two
 “ Leasehold Estates holden of Sir *Richard Cromwell* and
 “ the other, to *John* his eldest Son and the Heirs Male of his
 “ Body, the Remainder to *Leson* his second Son and the Heirs
 “ Male of his Body, the Remainder to the Daughters of
 “ *John* the Son, as Tenants in Common, the Remainder to
 “ the Daughters of *John* the Father in like Manner, the
 “ Remainder to the right Heirs of *John* the Father.”
 There then followed a Disposition in this Settlement of the
 Leasehold Estate that was holden of the Earl of *Pembroke*,
 and which was not of so great a Value as the other Lease-
 hold Estates. That was settled upon *Leson*, and the
 Heirs of his Body after the Death of *John* the Father, the
 Remainder to *John* the Son, and the Heirs of his Body.

In 1696 *John* the Father died; upon his Death the
 two Sons entered into the respective Lands contained in
 this Settlement.

In 1714 *John* the Son died, leaving Issue only one Son *John*, the Plaintiff, who was at that Time an Infant of eighteen Years of Age; a short Time before his Death he made his Will, and thereby made *John*, the Plaintiff, his Executor.

On the Death of *John* the Son in 1714, *Leson* entered upon the two Leasehold Estates holden of Sir *Richard Cromwell*, and built a House upon the other, which cost him 1000 *l*.

In 1721 *Leson* died, having devised these two Leasehold Estates to *Herbert Mackworth* and *Anne Mackworth*, and leaving them his Executors. On the Death of *Leson*, *John* the Plaintiff possessed himself of Part of the Estate of *Leson*, and thereupon *Herbert Mackworth* and *Anne Mackworth* filed their Bill against him, to have an Account of the Rents and Profits of the Estate of *Leson*; and *John* the present Plaintiff filed his Cross Bill against them as Executors of *Leson*, to account for the Profits of the two Leasehold Estates, holden of Sir *Richard Cromwell* and the other, which *Leson* received.

This Cause came to be heard before Lord *Talbot* on the 27th of *February* 1733, and he decreed in Favour of the Plaintiffs in the original Cause, dismissing the Cross Bill; but at the Time that the Decree was pronounced, the Settlement of 1655 was not known to *John*, the present Plaintiff; nor was it ever known to *Leson*, nor any of the Parties to that Suit; and thereupon the present Plaintiff filed a supplemental Bill in the Nature of a Bill of Revivor with new Matter against the *Mackworths*, setting forth, that this Deed of 1655 came lately into his Hands, and at the same Time rehear'd the former Causes, setting forth in his Petition of Rehearing, that he was intitled to the two Leasehold Estates mentioned in his Cross Bill, as Issue of
the

the Body of *John* the Son before-mentioned, and as Executor to him.

Lord Chancellor said, his Opinion was, That the Plaintiff could not be intitled to the Relief that he sought. In the present Case the Question is, whether the Deed of 1655, or that of 1693 is to take Place. Another Question indeed has been made, whether this Matter can now be examined into, by Reason that it has been said, that it does not appear, but the Plaintiff knew of the Deed of 1655 at the Time of the former Decree; and if that was so, the Plaintiff would indeed be precluded from entering into this Question now; but his Lordship's Opinion was, that it does not sufficiently appear, that the Plaintiff did know of that Deed at the Time of the former Decree, and therefore that the Point was now open to be gone into upon the Merits. The Plaintiff by his Petition of Rehearing does indeed mention that he was Heir of the Body of *John* the Grandfather, but there is no Colour to say, that the Plaintiff can make his claim in that Right. His Claim, if he had any, could only be as Executor to his Father, and as that is his Claim, it will be proper to examine, whether he is intitled to it, or not. It is indeed true, that under the Deed of 1655, the Plaintiff certainly is intitled, but then it will be necessary to examine, whether that Claim is not barred by the Deed of 1693, together with the rest of the Circumstances that there are in the present Case. With regard to the Deed of 1693, it was made by *John* the Grandfather. At the Time of making this Deed, the Grandfather was seised of several Estates, viz. of a Freehold Estate, and of three Leasehold Estates. The Deed expressly recites, that it was made to divide the Land amongst his Sons, as the Estates lay most convenient. It is observable too, that the Leasehold Estate holden of the Earl of *Pembroke*, which was settled by this Deed upon *Leson*, was not of so great a Value as the Two other Leasehold Estates settled upon the Plaintiff's Father; however, if

4

nothing

nothing farther had happen'd, this Deed could not have barr'd the Title of the Plaintiff under the former. But then it must be considered, what has happened subsequent to this Deed. *John* the Grandfather that made this Settlement died in 1696. on his Death the two Sons took Possession of the several Estates, according to the Provision of the Deed. *John*, the Father of the Plaintiff, enjoyed the Estates allotted by this Deed to him till 1714, which was eighteen Years from the Death of the Grandfather; and *Leson* enjoyed the Possession of his Part till 1721, which was twenty-five Years from the Grandfather's Death. After this Length of Time a Bill is now brought in order to overturn what the Deed of 1693 had done. The Defendant's Counsel have insisted, that the Plaintiff is barr'd by the Statute of Limitations. In Answer to this it has been said, that this is a Trust which the Plaintiff claims, and therefore that this Statute of Limitations does not extend to this Case. But his Lordship's Opinion was, that that was not a sufficient Answer, for that Rule only holds between *Cestuy que Trust* and his Trustee, but does not extend to the Case of a Stranger; for a Stranger is equally obliged to claim the Benefit of a Trust within the Time appointed by the Statute in case of a Trust Estate, as if it had been a Legal Estate. There is hardly any antient Family but there are long Terms in the Hands of Trustees; and if Strangers might be allowed to lay Claim to them after any length of Time, it might be greatly inconvenient; and as it is a Stranger that claims the Benefit of this Trust in the present Case, the Length of Time must be a Bar. But to shew that the Length of Time ought not to be a Bar in the present Case, it has been said, that *Leson* was guilty of a Concealment of the Deed of 1655; and 'tis indeed true, that there may be such a Concealment of a Deed as will prevent the Length of Time being any Bar in this Court. But then that Concealment must be a voluntary and fraudulent One; and if the Rule was laid down in any other Way, it might be of dangerous Consequence. Now the Concealment in the present Case by no Means appears to be of that Kind, but

Where the Trust of an Estate shall be barr'd by the Statute of Limitations.

See 1. Bro. Cha. Cas. 551.

Where a Concealment of a Deed will excuse the Party from not bringing his Bill in a convenient Time.

Wherea Decree shall be made to hold and enjoy by reason of Buildings being made upon the Premises.

to have been merely accidental. The Deed of 1655 was indeed in *Leson's* Possession from 1696 to the Time of his Death, but it does not appear that he knew any Thing of it. However, his Lordship said, he should not rest his Opinion merely upon this; for another very material Circumstance is, that *Leson* laid out 1000 *l.* in building upon the Premises, and during all that Time no Objection was made by the Plaintiff's Father. There have been Cases in this Court, wherein upon a Circumstance of that Kind the Court have even made a Decree to hold and enjoy; at least they have refus'd to make a Decree against the Party, unless the other Side has offered to make him a Compensation for the Money that he has laid out. But what is most material of all is the Division that the Grandfather made of these Estates by the Deed of 1693. It is very possible that it was Part of the Consideration for his giving his Son *John* his Freehold Estate, that *John* the Son considered that the Leasehold Estates in Question should go in the Manner as was limited by that Deed; and where that is the Case, that a Person claims a Benefit by one Part of a Deed or Will, he shall not be allowed to dispute the Rest of it. That was the Case of *Noys* and *Mordaunt*, *Stretfield* and *Stretfield*, and that of *Brown* and *Brown*; which last Case was determined by his Lordship. For these Reasons his Opinion was, that the Bill ought to be dismissed, but without Costs, and that the former Decree ought to be affirmed. And so his Lordship was pleased to decree accordingly.

April 25.

Garth and Crawford.

IN 1720 Sir *Edward Turner* made his Will, and thereby devised certain Lands for the Benefit of his Nephew *Edward Turner* for his Life, the Remainder to Trustees to preserve contingent Remainders, the Remainder to his First and other Sons in Tail Male; the Remainder to the Daughters of his Son *Charles*. At the Time of making this Will

Will Sir *Edward* had one Son and two Daughters, *Charles*, *Mary*, and ———. In 1721 Sir *Edward* died. *Charles* had Issue two Daughters, *Isabella* and ———. *Isabella* intermarried with *De Groot*. ——— who was Sister to *Isabella*, died without Issue, and by that Means *Isabella* became intitled to the whole Interest in the Remainder. In 1734 *De Groot*, who was Husband to *Isabella*, died. In 1735 *Isabella* made her Will, and thereby devised all her real and personal Estate to *Crawford* and *Peters* in Trust, that they should sell the same in order to discharge her Debts and Legacies, and that the Surplus should be distributed into three equal Shares; one Share whereof was to go to *Crawford*, another Share to *Peters*, and a third Share to *Dorothy Turner*. Soon after the making this Will *Isabella* died, and *Sarah Garth* was her Heir at Law. *Peters* and *Dorothy* were Papists, but *Crawford* was a Protestant. In April 1736 *Dorothy* mortgaged her Interest in this Estate to *Willis* for 108 l.

In May 1736 a Bill was brought by *Crawford*, *Peters* and *Dorothy*, against *Sarah*, in order to perpetuate the Testimony of the Plaintiffs Witnesses, and to prove the Will of *Isabella*.

In June following *Edward Turner* died without Issue; and the same Day, that *Edward* died, *Crawford* purchased of *Peters* his Interest in this Estate for 2000 l. There was no Money paid down, either at the Time of making this Purchase, or at any Time after; but a Bond was given by *Crawford* to *Peters* for the Payment of the Purchase-Money as soon as the real Estate of *Isabella* should be sold.

On the 3d of January following *Willis* purchased of *Dorothy* her Equity of Redemption in this Estate for 1000 l. There was no Money paid down at the Time of that Purchase neither, nor at any Time after; but it was agreed, that *Willis* should give to *Dorothy* a Bond for 500 l. that he should
give

give her a Note for 389 *l.* and that the remaining Part of the 1000 *l.* should consist of the Money which was due upon the Mortgage. Afterwards *Willis* paid to *Dorothy* 300 *l.* in Part Satisfaction of the Note.

On the 8th of *January* following *Sarah* put in her Answer to the Bill which has been mentioned, and thereby insisted, among other Things, that *Peters* and *Dorothy* were Papists, and consequently incapable by the Statute of 11 *W.* 3. to take by the Will of *Isabella*. In that Cause *Sarah* examined several Witnesses, to shew that *Peters* and *Dorothy* were Papists. The real Estate of *Isabella* was never sold to this Day. Her personal Estate was a very small one, and it was uncertain what her Debts would amount to, together with the other Charges which would fall upon her Estate.

The present Bill was brought by *Sarah* against *Crawford*, *Peters* and *Dorothy*, and likewise against *Willis*, in order to set aside the Will of *Isabella* with regard to the two Thirds of her real Estate, which was to be sold, and the Money arising from the Sale to be paid to *Peters* and *Dorothy*; and likewise that *Peters*, *Dorothy* and *Willis*, might account for the Profits of those Shares in the Estate.

The Defendants insisted by their Answers, that the Purchase which *Crawford* made of *Peters*, and the Purchase which *Willis* made of *Dorothy*, were good and valid by the Statute of 3 *Geo.* 1. 18.

After these Answers were come in an Order was obtained, that the Depositions in the former Cause might be read in the present one, saving just Exceptions.

On the Hearing of the present Cause the Depositions in the former one were offered to be read; but it was objected on the Part of *Willis*, that they could not be read as against him, he being no Party to the former Suit, and
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having his Mortgage made before the Filing of that Bill, and obtaining his Purchase of the Equity of Redemption before the Answer of *Sarah* came in.

Lord Chancellor said his Opinion was, That these Depositions ought to be read. He said, that this was a Question of very great Consequence in respect of Bills which are brought to perpetuate Testimony. And if he should disallow the Depositions to be read in the present Case, it would overturn the whole Use of these Kind of Bills. But in saying this he would distinguish between the Mortgage which was made to *Willis*, and the Purchase which was made by him of the Equity of the Redemption; for as to the Mortgage it is stated to have been made before the filing of that Bill, and therefore none of the Depositions which were taken in that Cause can any ways be read to affect it. But with regard to the Purchase of the Equity of Redemption, which was made subsequent to the filing of that Bill the Depositions ought to be read. For the Bill was brought in *May* 1736; it was a Bill brought by three Devisees in order to perpetuate Testimony, and to prove the Will of a real Estate; and that is the only Method of proving a Will of that Sort in this Kingdom. The Answer of *Sarah* came in the 8th of *January* following. It has been said, that on the 3d of *January* the Purchase of the Equity of Redemption was made which was before the Time that the Answer came in, and from thence it has been urged, that the Depositions which were afterwards taken shall not affect this Purchase. But though the Bill was filed in *May*, and the Answer did not come in till the 8th of *January* following, yet that Part of the Objection is no Reason against allowing the Depositions to be read; for it very often happens by the ordinary Indulgences which are given to the putting in of Answers, that an Answer does not come in to a Bill till that Distance of Time; nor will the other Part of the Objection, namely, that the Purchase was made before the Coming in of the Answer, be material. The Question is, Whether the Depositions in this Case

When a Bill is brought to perpetuate Testimony, and in order to prove a Will relating to a real Estate, if a Person purchases Part of the Estate pending that Bill, the Depositions taken in that Cause may be read against him, tho' the Purchase was made before the Coming in of the Answer.

A Bill that is not to be brought to Hearing is not such a Bill as can properly create a *Lis Pendens* so as to affect a Purchaser claiming under one of the Parties after the filing of the Bill.

A Bill which is brought to perpetuate Testimony, and to prove a Will is such a Suit, wherein the Proceedings under it, when they are rightly carried on, must affect those who claim as Purchasers from one of the Parties after the Filing of the Bill.

When a Bill is brought to perpetuate Testimony, and prove a

ought not to be read against a Person who claims under one of those who were Plaintiffs to that Bill? It has been made an Objection, that that was a Bill merely brought to perpetuate Testimony, and to prove the Will, and that no Relief was prayed under it. And 'tis indeed true, that that was not such a Bill which could be brought to Hearing, and therefore that it could not properly create a *Lis Pendens*, so as to affect a Purchaser claiming under one of these Parties after the Filing of the Bill; but that was such a Suit wherein the Proceedings under it, when they are rightly carried on, must affect those who claim as Purchasers from one of the Parties after the Filing of the Bill. Bills of that Kind have been long entertained as a proper Subject of the Jurisdiction of this Court; and it is of great Consequence to the Subjects of this Kingdom that they should be supported, as there is no other Way of proving a Will relating to real Estate. And if these Depositions were not to be read, it would put it in the Power of either a Devisee, or Person claiming as Heir at Law, to prevent such a Bill being of any Effect. His Lordship said, that he would in the first Place consider the Case of an Heir at Law. Suppose an Heir gets into Possession of an Estate on the Death of his Ancestor, and the Devisee that is out of Possession brings a Bill to perpetuate Testimony, and to prove the Will; the Heir at Law makes a secret Conveyance to another Person pending that Suit, if the Depositions taken in that Cause could not be read against the Person who claims under the Heir at Law, it would defeat the whole Benefit of the Suit. The Case is just the same in respect of its Consequences, if a Devisee gets into Possession, and brings a Bill of this Sort, and afterwards makes a private Conveyance, if the Heir at Law could not read the Depositions, which were taken in that Cause, against the Party who claims under the Devisee, the bringing that Bill would be of no manner of Effect. The bringing a Bill of that Sort by a Devisee is a Challenge to the Heir at Law to dispute the Title with him; and if he does, name-
Will, where the Defendant shall lose his Costs if he examines new Witnesses himself.

namely, by examining Witnesses of his own, the Consequence is, that he loses his Costs; the Reason of that is, that by examining such Witnesses he has a Benefit by the Suit as well as the Devisee. These were the Reasons upon which his Lordship's Opinion was chiefly founded, that the Depositions in the present Case ought to be read against *Willis*; and they were read against him accordingly. In the Progress of the Cause, the two principal Matters which were relied upon, to shew that these Purchases ought not to stand within the Statute of 3 Geo. 1. 18. were, First, That there was no Money paid by Way of Consideration for these Purchases, but only Securities given. And, Secondly, That at least with regard to the Purchase of the Equity of Redemption of a third Part of this Estate there was not a full Consideration agreed for it. Lord Chancellor said, that the last Objection could not be made out in point of Fact till the Account was taken; for which Reason it would be proper that only the Account should be directed to be taken at present, and that the remaining Points should be reserv'd to be determined after the Account should be taken. And so his Lordship was pleased to decree accordingly.

How far a Purchase made of a Papist shall not be good within 3 G. 1. 18. where there is no Money paid down, and only Security given for it.
How far a Purchase made of a Papist shall not be good within 3 G. 1. 18. by reason that there was not a full Consideration.

Gryles and Gryles.

April 27.

Elizabeth Gryles made her Will, and thereby bequeathed two Legacies of 500 l. apiece to each of her two Daughters *Philippa* and *Joan*, and devised her real Estate to her Son *Richard*, and the Heirs of his Body, subject to the Payment of these and some other Legacies. There were but two Witnesses present at the Time she signed and published this Will; but a few Days after she produced her Will before another Witness, and declared it to be her Will, but did not at that Time say, that her Name, which was at the Bottom of her Will, was of her own Hand-writing; nor did she sign her Name over again; however, this Witness swore, that he attested the Will in her Presence, and believed that her Name was of her own Hand-writing.

writing. *Elizabeth Gryles* died, and after her Death *Richard* suffered a Recovery of this Estate, and paid some of the Legacies which were charg'd upon it. *Richard* died, and on his Death the Estate descended to *Richard* his Son, who was an Infant of very tender Years. *Joan* was a Person of a very weak Understanding, and had the Misfortune sometimes of being a Lunatick, for which Reason *Philippa* took Care of her, and maintain'd her.

The present Bill was brought by *Philippa* and *Joan* against *Richard* the Infant, in order that the Legacies of 500 l. apiece before-mentioned might be raised out of this Estate; and that the Legacy which was given to *Joan* might be paid into the Hands of *Philippa*.

When a Will shall not be said to be duly executed according to the Statute of Frauds and Perjuries, by reason that the Testator did not duly

On the Hearing of this Cause a Question arose, Whether the Will of *Elizabeth* was duly executed, according to the Statute of Frauds and Perjuries? To shew that it was, Mr. *Brown* cited Precedents in *Chancery* 184. Mr. *Mills* on the same Side cited, amongst other Cases, the Case of *Cann* and *Cann*, determined by Lord *Macclesfield* the 25th of February 1718.

sign his Name in the Prefence of all the Witnesses.

Lord Chancellor said, That in *Carthew* the Case of *Lca* and *Libb* is to the contrary; and it may be a Point proper to be determined on an Issue at Law. However, the Counsel for the Plaintiff desired that the Cause might stand over, in order to consider, whether the Acts which *Richard* the Father had done did not amount to a Confirmation of the Will; and consequently, whether the directing the Issue would be necessary. And his Lordship ordered, that on Payment of Costs the Cause should stand over accordingly.

*Clarke and Abbot.**April 28.*

IN 1654 *Job Smith* and *Samuel* his Son made a Mortgage of the *Swan Inn* in *Chelsea* to *Winter* for the Sum of 200*l.* This Mortgage was made by Way of Feoffment. *Job* died and *Samuel* became his Heir at Law. *Samuel* afterwards died, and *Elizabeth Smith* became Heir to him. *Elizabeth* intermarried with *Thomas Broomwich*. In 1684 *Thomas* took an Assignment of *Winter's* Mortgage in the Name of *Anthony Broomwich* in Trust for himself; and being thus possessed both of the Mortgage, and of the Equity of Redemption, he laid out considerable Sums of Money in the Improvement of the Premises. In 1703 *Thomas* made a Mortgage of the Premises to *Elizabeth* his Sister for the Term of 500 Years, for securing to her the Payment of 30*l.* per Ann. during her Life, and after her Decease, for securing the Payment of 400*l.* to such of the Children or Grand-Children of *Thomas*, as she by Will or otherwise should direct and appoint. This Mortgage was made in Consideration of 400*l.* received by *Thomas* of his Sister. In 1707 *Thomas* made his Will, and thereby devised to his Grandson *Anthony Broomwich Abbot*, and his Heirs, all his Freehold Messuages and Garden Grounds in *Chelsea*. At the Time of making this Will *Thomas* had two Daughters, *Annie* and *Elizabeth*, and *Anne* had married with *Robert Abbot*, and had no other Lands in *Chelsea* besides the Premises before-mentioned. *Thomas* died, and *Elizabeth* his Wife survived him, and afterwards she died. *Elizabeth* the Daughter intermarried with *Peter Newly*.

In 1713 a Bill was brought by *Peter* and his Wife against *Robert Abbot* and *Anne* his Wife, against *Anthony Broomwich Abbot*, and *Robert* the Son of *Robert*, who was an Infant. That Bill pray'd, that the Plaintiffs might be let into a Redemption of a Moiety of the Premises, insisting, that *Thomas* had only a redeemable Interest in the

same, and no Power to dispose of the Inheritance, as he had done by his Will.

On the 11th of *May* 1715 that Cause came on to be heard, and the Court declared, that the Plaintiffs had a Right to redeem a Moiety of the Premises. And with regard to the Terms of Redemption they declared, that *Thomas* ought to be looked upon to have first entered on the Premises in the Right of his Wife, who had the Equity of Redemption, and that he so continued the Possession till he took an Assignment of *Winter's* Mortgage in the Name of *Anthony Broomwich* in Trust for himself, and therefore during that Time that the Rents and Profits of the Premises were no otherwise to be accounted for, than to keep down the Interest of that Mortgage, but that nothing was to be allowed for Repairs or lasting Improvements during that Time; and it was referr'd to a Master to take an Account of the Sums of Money which were laid out in the Repairs and lasting Improvements after the Assignment of that Mortgage. It was decreed, that one Third thereof was to be born by *Thomas*, as he had the Benefit of the Estate for Life; but as to the other two Thirds, the Master was directed to compute Interest for the same at the Rate of 6 *l. per Cent. per Ann.* from the Time the Money was laid out in such Repairs and lasting Improvements, which did amount to 100 *l.* And from the Death of *Thomas* the Master was to compute Interest for the Principal Money due upon that Mortgage, and was to take an Account of the whole Profits of the Premises; and if on taking such Account it should appear, that the Money laid out upon the Improvements together with Interest of the Money were unpaid, and that the Mortgage Money and Interest were unpaid likewise, the Decree directed, that *Robert* the Elder, and *Anthony Broomwich Abbot* should refund a Moiety of the Overplus to the Plaintiffs, and that a Moiety of the Premises should be assigned to the Plaintiffs. This Cause was afterwards reheard.

On the Rehearing the Court directed, that it should be added to the Order which was made on the former Hearing, that if *Anthony Broomwich Abbot* was overpaid a Moiety of what was due for Principal and Interest on the Mortgage, he should refund the Overplus, and that the Allowance of Repairs should be struck out of the Order, and that the rest of the Decree should be confirmed.

This Decree was never carried into Execution; and *Anthony Broomwich Abbot* was permitted to continue the Possession of the Premises to the Time of his Death. In 1720 *Anthony* mortgaged the Premises to *Elizabeth Taylor* for 400 *l.* That Mortgage was made by raising a Term of 1000 Years. In 1724 *Anthony* mortgaged the Premises to *Nicholas* for 400 *l.* more. In 1726 *Anthony* made a farther Mortgage of the Premises to *Nicholas* for 200 *l.* And afterwards in the same Year mortgaged them to him for 140 *l.* In 1728 *Anthony Broomwich Abbot* died, leaving *Anthony* his Heir at Law. Afterwards in the same Year, *Peter Newly* and *Elizabeth* his Wife, and *Anne Abbot*, who was the Widow of *Robert*, conveyed to *Robert* the Son of *Anne* the Premises before-mentioned, to hold to him and his Heirs. This Conveyance was made in Consideration of 10 *l.* paid by *Robert* to *Peter Newly*, and also of an Annuity of 10 *l.* per Ann. to be paid him during his Life, and of the natural Love and Affection which *Anne* bore to *Robert*. In 1729 *Robert* took an Assignment of the Mortgage which was made to *Elizabeth Taylor*. Afterwards, in the same Year, *Nicholas* assigned his Mortgages to *Clarke*. In 1732 *Elizabeth*, the Sister of *Thomas*, died, and at her Death there was 367 *l.* 10 *s.* due to her for the Arrears of her Annuity. Some Time before her Death she made her Will, and made *Peter Newly* her Executor, but did not make any Disposition of the 400 *l.* which she had a Power to dispose of. In 1736 *Peter* made his Will, and thereof appointed *Thomas Newly* his Executor. Afterwards, in the same Year, *Thomas* assigned to *Clarke* the Benefit

nefit of the 367 *l.* 10 *s.* and the whole Interest in the Mortgage which had been made to *Elizabeth* the Sister.

The present Bill was brought by *Clarke* against *Robert Abbot*, *Anthony Abbot*, and *Elizabeth Abbot*, praying, amongst other Things, that an Account might be taken of what Money was due to *Robert* on the Assignment of the Mortgage which was made to him by *Elizabeth Taylor*, and that the Plaintiff might redeem him, that *Anthony* and *Elizabeth* might come to an Account with the Plaintiff touching the Mortgages which were assigned to him; that they might be decreed to pay those Sums to the Plaintiff, together with the Money which he shall pay to *Robert*, and in Default thereof, that *Anthony* may be foreclosed.

This Bill was afterwards amended, and then *Young* was added a Plaintiff, and *Tho. Newly*.

Lord Chancellor said his Opinion was, That the Plaintiff was intitled to Relief as far as he can take that Relief within the Compass of the former Decree. He said, if the Plaintiff had got the legal Estate, either in himself or a Trustee for him, so that he could have brought an Ejectment, and put the Defendants to have been Plaintiffs here, it might indeed have deserved Consideration, whether these Defendants would have been intitled to have redeemed the present Plaintiff. But as the Plaintiff has not the legal Estate, and is forced to come into Equity, he must submit to be redeemed by *Anthony Abbot*, who is one of the Defendants, and can put no other Terms upon his redeeming him, than such as fall within the Compass of the Decree, which has been mentioned. *Qui prior est tempore, potior est jure*, is a Rule that holds in Respect of equitable Rights as well as in Respect of legal ones. In the present Case *Robert* had the first equitable Right, and therefore his Mortgage must be paid off in Preference to that of the Plaintiff. What is the Nature of the present Case? *Job* and *Samuel Smith* joined in a Mortgage in Fee, and

Where a
Mortgage
shall pass by
the Word
Freehold.

termines, that *Thomas* is to be considered to have been in Possession as Owner of the Estate from the Time he married *Elizabeth* to the Time he took the Assignment; and therefore no Account of the Profits is directed to be taken during that Time. But from the Time that he took the Assignment it is decreed, that one Third of the Interest was to be born by *Thomas*, as he had the Benefit of the Equity of Redemption for his Life. But as to the other two Thirds, the Master was directed to compute Interest for the same at the Rate of 6 l. per Cent. per Ann. and likewise for the Money which was laid out in Repairs and lasting Improvements from the Time that the Sums so laid out amounted to 100 l. so that from the Time of the Assignment, *Thomas* is considered by this Decree meerly as a Mortgagee. The present Plaintiffs *Clarke* and *Young* claim as deriving under *Thomas*, and the present Defendant *Robert Abbot* claims as deriving under *Anthony Broomwich Abbot*. The Plaintiff brings his Bill, and insists at the Bar, that considering the Length of Time since the former Decree was made, *Anthony Abbot* cannot be intitled to redeem him. But that can be no Objection; for when a Decree is made for a Redemption, either Party may carry that Decree into Execution. The Question to be considered only is upon what Terms the Redemption is to be directed. And his Lordship said he did not see that the Terms of Redemption could be on any other Foot than according to the former Decree. It is indeed true, that the Plaintiff has taken in the Mortgage which was made to *Elizabeth* the Sister of *Thomas*, which was prior to Mrs. *Taylor*'s Mortgage, which *Robert* claims under. But he has no legal Estate for want of Taking an Assignment from *Anthony Broomwich*, or at least for want of having him before the Court, in order to have a Conveyance; and therefore *Robert*, who had the Assignment of the Mortgage, which was made to Mrs. *Taylor*, previous to any Assignment of a Mortgage, which *Clarke* took, must be preferred before him. And it never

When a Decree is made for a Redemption, after what Length of Time that Decree may be carried into Execution.

When a Decree is made for a Redemption, how far each Party may carry that Decree into Execution.

When a Person is intitled to redeem a Mortgage, upon what Terms that Redemption shall be decreed.

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How far a

pursue Mortgagee shall not be allowed to protect himself against another Mortgagee, by Purchasing in a prior Mortgage, where there is no legal Estate in the first Mortgagee.

was determined, that a *puisne* Mortgagee could protect himself against a prior Mortgagee, by purchasing in a Mortgage previous to that, where there is no legal Estate in that Mortgagee from whom he takes his second Assignment, especially without bringing the Trustee of that Mortgagee before the Court. And so his Lordship was pleased to decree accordingly.

Standish and Radley.

April 29.

IN 1657 *Richard Standish* executed a Deed, whereby he conveyed his Estate to Trustees, and reserv'd to himself a Power of charging it either by Deed or Will, in such Manner as he should think proper. Afterwards, in the same Year, he made his Will, whereby he devised those Lands to *Richard* his eldest Son, and the Heirs Male of his Body, with divers Remainders over; but by the same Devise he charged the Premises with the Payment of 500 *l.* a-piece, for the Benefit of his younger Sons, at their Age of Twenty-one. Afterwards he made a Codicil to this Will, and thereby devised certain Lands called *Knowley* and *Chorley*, which were Parcel of the before-mentioned Premises, to his Wife for Life, the Remainder to his Son *Richard* in Tail, with other Remainders over, and charged these Lands with the Payment of 100 *l.* a-piece to each of his younger Sons by Way of additional Portion, when his Son *Richard* should come into Possession of those Lands. At the Time of making this Will the Testator had five younger Sons, *Peter*, *Alexander*, *Ralph*, *John* and *Hugh*, and two Daughters, *Anne* and *Frances Margareta Elizabeth*, who was Wife to *Richard* the Elder, died in his Life-time, and *Richard* the Elder died in 1661.

On his Death *Frances Parsons* got the Tuition of the Children, they being all Minors, and took Possession both of the real and personal Estate. About 1671 *Richard* the Younger became of Age, and afterwards was created a Baronet.

Baronet. *Peter* was put Clerk to an Attorney by Sir *Richard*, and on that Occasion Sir *Richard* paid for him 50*l.* *Peter* did not stay a great While with his Master, but came and lived with Sir *Richard*. On the 16th of *January* 1673 he gave Sir *Richard* a general Release of all Demands, that he had upon him, and particularly of his filial Portions. *John* was at this Time dead, and he made *Peter* and *Anne* his Executors; by which Means they became each of them intitled to a Moiety of such Part of the Portion belonging to *John*, as remained unpaid. But Sir *Richard* had maintain'd him likewise, and put him Apprentice to a Merchant. On the 19th of that same *January*, *Peter* came to an Agreement with Sir *Richard*, whereby in Consideration of *Peter's* Releasing his 500*l.* Legacy, Sir *Richard* agreed to pay him an Annuity of 20*l.* per Ann. during his Life, and to keep him a Servant and a couple of Horses. *Alexander* and *Ralph* were sent to the University of *Cambridge* by Sir *Richard*. About 1675 *Alexander* gave a general Release to Sir *Richard*, and it was to the same Effect with that which was given by *Peter*. In the Year following, whilst *Alexander* and *Ralph* were at the University, Sir *Richard* paid them several Sums of Money by the Hands of his Steward. In 1677 Sir *Richard* sold Part of the Lands to *Cooper*, which came to him by the Will of his Father. Amongst the Title-Deeds the two Releases before-mentioned were delivered to *Cooper*. In 1678 *Ralph* executed a Release to Sir *Richard*, and thereby expressly discharged both his Legacies. *Hugh* was put Clerk to an Attorney as well as *Peter*, and at different Times he received several Sums of Sir *Richard* for Interest of his two Legacies, and gave him Receipts for that Purpose. In 1687 he gave him two Receipts for different Sums by Way of Interest. But in those Receipts it was taken Notice of, that they were only for the Interest of 300*l.* due to him from Sir *Richard*. In 1690 another Receipt was given by *Hugh* to Sir *Richard* for Interest, and that Receipt took Notice, that the Interest was only for 300*l.* due to him from Sir *Richard*. In 1693 Sir *Richard* died, leaving Sir *Thomas* his Heir at Law. In

In 1702 *Peter* filed his Bill in the Court of Chancery of the County Palatine of *Lancaster*, against Sir *Thomas*, who was an Infant, in order to have the Benefit of the Agreement, which he had entered into with Sir *Richard* on the 19th of *January* 1673, or else that he might have the Benefit of the two Legacies which were bequeathed to him by his Father.

The Bill was brought likewise in order to have the Benefit of such Part of the Portion as was due to him in the Right of *John*. That Cause never came to a final Determination, by Reason of Terms of Accommodation. *Anne* had married with *Stephen Radley*, and *Patricius Bradley* had intermarried with *Elizabeth* their Daughter. In 1713 *Peter* made an Assignment to *Patricius* of the whole Demands, which he had upon Sir *Thomas*, and agreed that his Name should be made use of by *Patricius* in prosecuting those Demands. In the same Year *Patricius* instituted a Suit in the Duchy Court against Sir *Thomas* on that Account. That Cause came on to be heard, and Sir *Thomas* making Default, a Decree was made for an Account; but that Decree was never carried into Execution. Afterwards in that same Year *Stephen Radley* and *Anne* his Wife, *Patricius Bradley* and *Elizabeth* his Wife, and *William Radley*, brought their Bill in this Court against Sir *Thomas Standish* and others, in order to have the Benefit of the Portions, which belonged to *Alexander*, *Ralph*, *John* and *Hugh*, and *Patricius* prayed, that he might have the Benefit of the Assignment, which *Peter* made to him in the Manner before-mentioned.

Sir *Thomas* put in his Answer to this Bill, and thereby amongst other Things said, that he had been informed and believed, that *Hugh* came to an Agreement with Sir *Richard*, to accept an Annuity of 18*l.* per Ann. in Discharge of his Legacies, and that he was induced to believe the same from the frequent Reports in the Neighbourhood to that Purpose.

In 1715 *Peter* brought his Bill in this Court against *Patricius* and others, in order to be relieved against that Assignment. On the second of *August* 1717 those two Causes came on to be heard at the *Rolls*, when his Honour declared, that the Annuity of 20 *l. per Ann.* which *Peter* was to have by the Deed of the 19th of *January* 1673, was a good Discharge of the Legacy of 500 *l.* given by the Will of *Richard*; but that the 100 *l.* which was given as an Addition to his Portion, was still subsisting. His Honour farther declared, that the Release, which *Ralph* had given in 1678, was a Bar to the Demand of *Radley* and his Wife, with Regard to the third Part of his Portion; and thereupon the Bill as to that was dismissed. But his Honour declared, that the Portions of *Alexander* and *Hugh* still remained unsatisfied, and directed that those Portions should be rais'd. And as to the Assignment made by *Peter* to *Patricius*, his Honour decreed, that the same should be set aside; but that *Patricius* should have a liberal Allowance for his Pains in negotiating the Cause in the Duchy Court, and that the Assignment should stand as a Security for what should be allowed him in Respect thereof, and what other Monies he had advanced on that Account.

At the Time this Decree was pronounced, Sir *Thomas* knew nothing of the two Releases before-mentioned, which *Peter* and *Alexander* had given to Sir *Richard*, nor on the Hearing of those Causes were the three Receipts before-mentioned produced, which *Hugh* gave to Sir *Richard*. However, after Publication, and before the Decree, those three Receipts came into the Hands of *Ashton*, who was Attorney for Sir *Richard*. The Master made his Report in pursuance of this Decree, and in 1722, according to that Report, there was due to the Plaintiffs in those Causes 2389 *l.* 10 *s.* 10 *d.* In 1724 an Agreement was entered into between Sir *Thomas Standish* and the Plaintiffs in those Causes to the following Effect. The Agreement took Notice, that there then appeared to be due to those Plaintiffs
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from the Trust Estate 3078 *l.* 18 *s.* 2 *d.* besides Costs of Suit; and thereupon it was agreed, that Sir *Thomas* should pay to those Plaintiffs 3000 *l.* in full Satisfaction of their Demands, namely, 1000 *l.* on the 24th of *June* 1725, and the remaining 2000 *l.* on the 11th of *November* following. This Agreement was only by Parol; however in pursuance of it Sir *Thomas* paid those Plaintiffs 300 *l.* before the 24th of *June* 1725, and afterwards several other Sums, amounting in the Whole to 1902 *l.* 1 *s.* 10 *d.* In 1732, and not before, Sir *Thomas* discovered that *Peter* and *Alexander* had released their Legacies to Sir *Richard* in the Manner before set forth, and that those Releases were delivered over to *Cooper* in 1677 in the Manner, that has been mentioned. This Discovery came to the Knowledge of Sir *Thomas* by the Means of Mrs. *Warren*, who was Widow to *Edward Warren*, to whom *Cooper* devised the Premises.

The present Bill was brought, in nature of a supplemental Bill, by Sir *Thomas* against *William Radley*, *Elizabeth Bradley*, *Alexander Radley*, and *William Woods*, praying amongst other Things, that the Agreement in 1724 might be established; but that Sir *Thomas* might be at Liberty to have the Benefit of the Releases, which were given to Sir *Richard* by *Peter* and *Alexander*; that no more might be considered to be owing for the Portion of *Hugh*, than the 200 *l.* and that what he was so intitled to might be deducted out of the remaining Part of the 3000 *l.* which continued unpaid.

There was likewise a Petition of Rehearing in the Nature of a Bill of Review, which came on to be heard at the Time that the supplemental Bill did, praying, that the former Decree might be reversed in these Particulars, that Decree having never yet been signed and inrolled. There was no Affidavit annex'd to the supplemental Bill, setting forth, that the Discovery of the Releases, which were given by *Peter* and *Alexander*, came to the Knowledge of Sir *Thomas* since

since the Decree at the Rolls; however an Affidavit of this Sort was annex'd to his Petition of Rehearing.

To this Bill the Defendants pleaded in Bar the Decree at the Rolls; but on the Arguing of that Plea the Court over-ruled it, with Liberty to except.

Lord Chancellor said his Opinion was, That the Plaintiffs were intitled to Relief. He said, that this was a Case which was a very extraordinary one, and such as has been made so by reason of the great Length of Time through which these Transactions have passed. There are several Objections which have been made, some of them relating to the Method, which the Plaintiff has taken to attain the Right which he seeks for, and others of them to shew, that he has no Right at all. With regard to the Method, which the Plaintiff has taken to attain the Right, which he seeks for, it must be owned that it is a Method not of a very long Standing; but there have been some Precedents of it, one of them in the Time of Lord *Talbot*, and two in his own Time; and it is in itself a reasonable Thing, that this Method should be allowed of, when a Decree is not signed and inrolled. The Method which has been taken is, to bring a supplemental Bill containing new Matter, which the Party has discovered since the former Decree, and at the same Time a Petition of Rehearing in the Nature of a Bill of Review, praying, that the former Decree may be rectified in the Particulars complained of by the Bill. This Method of Proceeding is founded upon Reason; because if the Party should be forced to sign and inrol a Decree, which he thinks himself agrieved by, and then to bring a strict Bill of Review, it would only tend to Expence and Vexation; whereas the Method of Proceeding, which the Plaintiff has taken, attains the Justice of the Case as fully as the other would. 'Tis indeed true, that it is fit, that this Method should be put under the same Restriction as the other. And as in the other Method the Plaintiff must annex an Affidavit to his Bill of Review,

Where a supplemental Bill will lie containing new Matter, which the Party has discovered since the former Decree, and at the same Time a Petition of Rehearing in the Nature of a Bill of Review, praying, that the former Decree may be rectified in the Particulars complained of by the Bill.

Review, setting forth, that the Matter, on which he founds his Relief, has come to his Knowledge since the Time of the Decree; so it is fit that an Affidavit of this Sort should be annexed to the supplemental Bill. But according to the former Precedents that has not hitherto been required, and therefore it cannot be insisted on in the present Case. The next Consideration relates to the Merits of the Plaintiff's Right; and as to that it must be agreed, that this is not such a Case, as is absolutely clear in Favour of the Plaintiff; but considering the new Evidence, which is produced, and the other Circumstances, the Strength of the Evidence is greatly in Favour of Sir *Thomas*. The Decree, which was made against him at the Rolls, was in itself a pretty hard one, considering the great Length of Time, which had passed since these Legacies were first of all given. These Portions originally took their Effect under the Deed of 1657, and under the Power reserv'd by that Deed; the Codicil was made in 1661 which gave those Portions. *Richard* did not live a great while after, and considering that these were Portions which were given so long ago, to be sure the Presumption is, that they are satisfied, and it must be an exceeding strong Proof almost amounting to the Proof of a Negative to give an Answer to this Presumption; and the rather, because the Parties are all Representatives. These Portions were divided into different Sums of 500*l.* and 100*l.*; the 500*l.* was charged upon all his Lands in general, the 100*l.* only upon particular Lands called *Knowley* and *Chorley*. At the Time of the Death of *Richard* there were five younger Sons, *Peter*, *Alexander*, *Ralph*, *John*, and *Hugh*. It is admitted, that by the Decree, which was made at the Rolls, both the Portions of *Ralph* were held to be satisfied, a Release appearing which clearly discharg'd them both. With regard to the other Portions, which belong'd to *Peter*, *Alexander*, *Hugh*, and *John*, 'tis declar'd by the Decree, that they were not satisfied, and Directions were given for the Raising them. The first Bill was brought in the Court of Chancery in the County Palatine of *Lancaster*; it was a Bill brought in order that the 20*l.* Annuity might be rai-

fed according to the Agreement of the 19th of *January* 1703, together with the other Provisions contained in that Deed, or else that the two Portions of 500 *l.* and 100 *l.* might be raised for the Benefit of *Peter*; no Decree appears to have been made in that Cause. That Bill is an express Admission, that some Agreement was made between *Peter* and Sir *Richard*. After this there was another Bill brought in the Duchy. But the most material Bills relating to the present Question, are those which were brought in this Court, and wherein the Decree was made at the Rolls. The present Bill, together with the Petition of Rehearing is brought, in order that that Decree may be reviewed and reversed. There are three Matters wherein the present Bill seeks to be relieved; one of them relates to the Release which was given by *Peter*; another of them relates to the Release which was given by *Alexander*; and the third of them relates to Part of the Portion, which it is said only remains as owing to the Estate of *Hugh*. With regard to the Releases it is insisted, that they were not known to Sir *Thomas* at the Time the Decree at the Rolls was made, and that they first came to be discovered to him in 1730. The Releases are general ones, wherein the Words *filial Portions* are inserted, and consequently on the Face of those Releases, if nothing more appear'd, they will extend to bar all the Portions which were due to *Peter* and *Alexander*. It is proved by *Ousey*, that in 1730 these Releases were found in the Hands of Mrs. *Warren*; she was Representative of *Edmund* her Husband, and he was Devisee of *Cooper*, who purchased Part of these Lands of Sir *Richard*. As these Releases are general, and the Words *filial Portions* expressly inserted in them, the Plaintiff must have the Benefit of them by Way of Discharge of these Portions, as no Evidence is given, that he knew of them at the Time of the former Decree. And even on a strict Bill of Review the Rule is, that the Parties shall have the Benefit of new Evidence, provided it was in Being at the Time the former Decree was

How far on
a strict Bill of
Review the
Rule is, that
the Parties
shall have the
Benefit of

new Evidence, provided it was in Being at the Time the former Decree was made, and did not come to the Knowledge of the Party till afterwards.

was made, and did not come to the Knowledge of the Party till afterwards. This was determined to be the Rule in the Case of ——— and *Jacobson*, in the Time of Lord *Harcourt*. Consider then the Objections, which are made to the Release of *Peter*, to shew, that the Plaintiff ought not to have the Benefit of it in the present Case. One of the Objections has been, that this Release was given the 16th of *January* 1673, and the Agreement made between Sir *Richard* and him was not made till three Days afterwards; and in that Agreement 'tis expressly taken Notice of, that it was only in Consideration of the 500 *l.* Legacy given up by *Peter*; for which Reason it has been urged, that as the 500 *l.* Legacy was subsisting three Days after the Release, the Release must have been made without any Consideration. But this Objection may be plainly answered by observing, that the Release and the Agreement, though dated at different Days, ought to be considered as one and the same Transaction. But then it has been said, that still the Decree in this Respect is right, as that Decree expressly declares, that the Portion of 500 *l.* belonging to *Peter* is discharged, though not the Portion of 100 *l.* And his Lordship said, he did think, that at the Time the Decree was made it was right in declaring, that the Portion of 100 *l.* was not discharg'd, by reason that the Release did not then appear, but only the Agreement; but now the Release does appear, it is a Discharge of both Portions, the Words of it being *All filial Portions*. It has been said, that this Release being found in the Hands of Mrs. *Warren*, who claims under a Purchaser of Part of this Estate, is an Evidence that this Release was only given in order to satisfy a Purchaser. And if the Release was given just before the Purchase, there might have been some Colour for the Objection. But the Release was given in 1673, and the Purchase was not made till 1677, so that there's no Reason to say that the Release was given merely for that Purpose. Nor is it to be imagined, that *Peter* would accept the Annuity of 20 *l.* per Ann. which was only made in Consideration of his discharging the 500 *l.* Portion, and that he would give a general

Where a Portion shall be said to be barr'd by a Release.

Where two Deeds shall be said to be made upon the same Occasion, tho' one of them bears a different Date from the other.

When a Release is given of a Portion which is chargeable on a real Estate, where the Release shall not be said to be given merely for the Purpose of clearing the Estate with regard to a Purchaser.

neral Release for the Whole, if he did not receive a Satisfaction for the Whole. It cannot be imagined that he should do this, and suffer the Sale of the *Chorley* Estate to be made without looking out for a Satisfaction against the Purchaser. 'Tis indeed true, that *Peter* brought his Bill in the Court of Chancery of the County-Palatine of *Lancaster*, insisting to have the Benefit of the Agreement, or else to be paid both his Portions. And his Lordship said, that at first he thought that Objection of a good deal of Weight to shew, that the Release was not given for a valuable Consideration, but that it was only made for the Purpose, which has been mentioned, of satisfying a Purchaser; but when it is considered, that that Bill was not brought directly to have the Portions raised, but to have the Benefit of the Agreement, that Objection ceases, and indeed strengthens the Argument to shew, that these Portions were really intended not to be subsisting. Thus the Matter stands with regard to the Release, which was given by *Peter*. As to the Release which was given by *Alexander*, it appears to have been dated the 24th of *March* 1675. This Release contains the very same Words in it, as the Release does which was given by *Peter*. But to shew, that this Release ought not to be binding in the present Case, several Observations have been made. Some of them have been of the same Kind with those, which were made upon the Release given by *Peter*. Of this Sort was the Objection, that the Release was found in the Hands of one who claim'd under a Purchaser of Part of this Estate. But that Objection can be of no Weight, by reason that the Purchase was made two Years after this Release was given. And it was natural, that this Release, and likewise the other, should be in the Hands of the Purchaser, by reason that without them the Purchaser could not shew, that the Estate was discharg'd of these Portions. This Release, which was given by *Alexander*, stands on the same Foundation with the Release which was given by *Ralph*, wherein it is admitted, that it was declared by the Decree, that with regard to that Portion it was absolutely discharged. And what

what is it that is offered to make a Distinction between these two Cases? It is said, that after the Release which was given by *Alexander*, Sir *Richard* paid him several Sums of Money, when he was at *Cambridge*; and from thence it is inferr'd, that this Release was given merely for the Purpose of shewing a Purchaser, that the Estate was discharged of these Portions. But no Argument of this Sort can be drawn from there being such Payments made; for between Brothers it was natural, that there should be such Payments. The next Consideration relates to three of the Receipts which were given by *Hugh* to Sir *Richard*; two of these Receipts were given in 1687, the other in 1690. They express the Interest to be paid for 300 *l.* It is insisted on, that this is an Evidence, that at the Time these Receipts were given the remaining Part of the Portions belonging to *Hugh* were satisfied. And these Receipts must be a conclusive Evidence for such Purpose, unless something can be shewn to the contrary, especially as *Hugh* was bred a Clerk to an Attorney. And nothing material has been offered to take off this Inference from these Receipts. But it has been insisted on, that no Argument of this Sort can now be drawn from these Receipts, by reason that they are not newly discovered since the Time of the former Decree. That Part of the Fact depends upon the Account given by *Ashton*, who swears, that he was concerned as Solicitor for Sir *Thomas* in those Causes, which were heard at the Rolls, and that these Receipts came into his Hands after Publication, and before the Decree. But though it is the Rule, that in order to have the Benefit of new Evidence on a Bill of Review, it must be Evidence, which came to the Knowledge of the Party after the Time of the Decree, and in Being at the Time of the Decree; yet his Lordship said, that he did not know, that this was held so strictly in these Kind of Proceedings, where the Matter comes on upon a supplemental Bill, and a Petition of Rehearing in nature of a Bill of Review, especially where the Justice of the Case re-

Where a Portion shall be said to be released notwithstanding there are Payments made subsequent to the Release.

Tho' it is the Rule, that in order to have the Benefit of new Evidence on a Bill of Review, it must be Evidence which came to the Knowledge of the Party after the Time of the Decree, and in Being

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at the Time of the Decree; yet his Lordship said, that he did not know that this was held so strictly in these Kind of Proceedings, where the Matter comes on upon a supplemental Bill, and a Petition of Rehearing in the Nature of a Bill of Review, especially where the Justice of the Case requires the contrary.

How far an Agreement shall not be specifically carried into Execution, by reason that it is only made by Parol.

How far an Agreement which is made subsequent to a Decree shall not bar a Man from rectifying the Errors in that Decree.

When an Agreement is made in order to compromise a Matter in Dispute, how far Evidence shall not be admitted, to shew that that Agreement was improper to be made.

Out of what Sum of Money another Sum shall be ordered to be deducted.

quires the contrary. The remaining Question to be considered relates to the Agreement, which Sir *Thomas* enter'd into with the Defendants, from whence it has been urged, that the Plaintiff is thereby concluded from having any Benefit either of the Releases or the Receipts. This was an Agreement made by Parol only, and not reduced into Writing; the Consequence of which is, that neither of the Parties could come into this Court in order to have a Decree for a specifick Performance of it, unless it was confess'd by the Answer of the Defendant. Two Things have been insisted on by the Defendants; One, that as this Agreement is made, the Plaintiff cannot have the Benefit either of the Releases or the Receipts. And, Secondly, That at least what the Plaintiff prays is too much in insisting, that the Allowance to be made him on the Account of these Releases and Receipts ought to be deducted out of the remaining Part of the 3000*l.* which was in his Hands. With regard to the first of these Matters, 'tis carrying it too far to say, that the Agreement ought to have such an Effect; for though it is true, that when Parties enter into an Agreement to compromise a Matter which was the Thing that was in Dispute between them, they shall not have the Benefit of any new Evidence, to shew that the Agreement was improper for them to make. And that was the Point determined by Lord *Macclesfield* in the Case of *Cann* and *Cann* in 1721, yet that is by no means the present Case; for this Agreement went upon a Supposition, that the Money contained in the Report was due, together with the Interest of it, amounting to 3078*l.* 18*s.* 2*d.* together with the Costs, and the Defendants agreed to accept of 3000*l.* to be paid at different Days, in Discharge of the Whole. With regard to the second Point 'tis indeed true, that the Plaintiff insists on too much, by desiring, that the Allowance to be made him on the Account of the Releases and the Receipts ought to be deducted out of the remaining Part of the 3000*l.* which is in his Hands. But the right Way is, that it should be deducted out of the Money, that is found to be due by the Master's Report. And so his Lordship was pleased to decree accordingly.

Walmesley and Booth.

June 29.
1739.

IN 1728 *Japhet Crook* was under Prosecution in the *King's Bench* for Perjury and Forgery, and had several Actions brought against him. Upon this Occasion he took Lodgings in *Whitehall*, and absconded. In the Month of *October* in that same Year, *John Booth* was imployed as his Attorney to defend him in these Prosecutions and Actions. In Order to his being bailed to the Indictments, Lord Chief Justice *Raymond* insisted, that *Crook* should enter into a Recognizance of 10000 *l.* and find two other Persons who should be bound for him, each in the Penalty of 5000 *l.* *Crook* was not able to get this Bail himself, but *Booth* procured it for him. However *Booth* was forced to make a great many Applications in order for the obtaining it. This took up most of his Time between the Month of *October* and the Beginning of *December* following; however, during that Space of Time, *Booth* was imployed in another Business for him, which was the Drawing his Will. *Crook* gave Instructions for it, sign'd with his own Hand, in which Instructions he inserted a Legacy of 1000 *l.* to *Booth* and 500 *l.* a-piece to the Bail. This Will was accordingly executed by *Crook*, but when he had done it, *Booth* proposed to him, that he would give him a Bond for securing his Legacy, and *Crook* readily agreed to it. Accordingly a Bond was made by *Crook* to *Booth* on the second of *December*, bearing Date on the first, in the Penalty of 2000 *l.* with a Condition to the following Effect; "Whereas *John Booth* has been serviceable to *Japhet Crook* in several Causes, and still continues to be so, and the said *Japhet Crook* being thoroughly sensible of the Services and Favours, if the said *Japhet Crook* shall leave to the said *John Booth* a Legacy of 1000 *l.* then the Obligation shall be void, otherwise to stand in full Force." After this *Crook* revoked this Will, and made a new one; of this new Will he made his

his Servant Maid *Mary Walmesley* Executrix, and gave her the Residue of his Estate, which amounted to 17000 *l.*

In this new Will he left out the Legacy, which by the former he had given to *Booth*, and in his new Will declared, that the obtaining that Legacy from him in the former was an Imposition upon him. *Crook* died in 1734; after his Death *Mary* intermarried with *Charles Walmesley*, and thereupon an Action was brought by *Booth* against *Charles* and *Mary Walmesley* upon this Bond, and Judgment was had against them; *Booth* at the same Time delivered them a Bill of Costs, wherein was a great Variety of *Items* on Account of Attendances between *October* and *December*, to procure this Bail; and thereupon the present Bill was brought by *Charles* and *Mary Walmesley* against *Booth*, praying to be relieved against this Bond.

But *Lord Chancellor* said, his Opinion was, That the Bond could not be relieved against. His Lordship said, that he was to consider this Bond as a voluntary Gift. The Recital of it is of Favours being done by *Booth* to *Crook*, which shews that it was not given towards securing a suppos'd Debt; and if this was to be considered as a voluntary Bond, the next Question would be, whether there was a sufficient Foundation in that Light to relieve against it; and his Lordship's Opinion was, that there was not. It has been insisted, that the Defendant was an Attorney, and that it was contrary to his Duty to procure a Gratuity from his Client for such Kind of Services, as finding Bail for him. And it is indeed true, that the obtaining Gratuities of this Sort are not such Things as ought to be encouraged; but it is impossible to say, that every Bond of this Sort shall be relieved against in this Court. It is suggested by the Bill, that at the Time of giving this Bond *Crook* was a Prisoner in the *King's-Bench-Prison*; the Fact comes out to be otherways, and it appears he did no more than take Lodgings at *Whitehall*, and abscond there; but if he

he had been in Prison, and been there under lawful Process, this would not have been *Dureſs* by the Common Law; however, if that had been true, that might have been ſuch a Circumſtance as to have avoided the Bond in this Court. The preſent Caſe has been compared to two others, namely, one of Bonds given by Heirs, the other of Marriage-brokage Bonds; in which Caſes it has been ſaid, that the Court does conſtantly relieve againſt them. But his Lordſhip's Opinion was, that the preſent Caſe could not be compared to either of thoſe, which have been mentioned. With regard to the firſt of thoſe Caſes, the Court does preſume, that a young Heir in the Life of his Parent, being under Diſtreſs, is ſuch a Perſon as is liable to be impoſed on. And in Caſes of that Sort, wherein the Court relieves, it is neceſſary that he muſt be a young Heir; and in ſuch Caſe the Preſumption of his being impoſed on ariſes from the Circumſtances of the Party; and in the preſent Caſe, if any Circumſtances had been proved to ſhew, that *Crook* was liable to be impoſed on, he would have relieved againſt this Bond likewise. And his Lordſhip ſaid, that he would have laid hold of the flighteſt Circumſtances for that Purpoſe. With regard to the ſecond Inſtance, that has been put, of Marriage-brokage Bonds, it is indeed true, that the Court relieves againſt them; but that is on Circumſtances of another Kind, and that Caſe cannot be compared to the preſent one. In this Caſe too the Length of Time is a conſiderable Circumſtance for not relieving againſt this Bond; the Teſtator living ſix Years after it was made, and not one Attempt during all that Time to ſet the Bond aſide. His Lordſhip ſaid, that during the Progreſs of this Cauſe he had indeed conſidered, whether he might not direct, that this Bond ſhould only ſtand as a Security for what was *bonâ fide* owing to *Booth* by the Teſtator, according to the Caſe of *Proof* and *Hinds*, determined by Lord *Talbot*. There a gratuitous Bond was given as an Incouragement for the finding out a Pedigree; and Lord *Talbot* directed, that the Bond ſhould only ſtand as a Security for what the Party deſerved for his

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Trouble. But upon further thinking on that Matter, his Lordship's Opinion was, that this Case could not be compared to that, by Reason that this Bond was not given by the Testator to pay *Booth* a Sum of Money in his Life-time, but to leave him a Legacy at his Death; had indeed this Bond been given to have paid him a Sum of Money in his Life-time, his Lordship said, that he should have inclined to have done the same Thing as was done by Lord *Talbot* in the Case of *Proof* and *Hinds*; but as the Bond was given to leave the Party a Legacy, the Bond must either absolutely stand, or else be absolutely set aside. However his Lordship repeated it again, that if there had been any Imposition on the Testator, or any Weakness in him, he would certainly have relieved against this Bond. With regard to the Bill of Costs, his Lordship said, that that must be taxed; but then as to that, there may be this Distinction, that it may not be reasonable, that *Booth* should be allowed any of the *Items* relating to his Attendances in procuring Bail, they being the principal Motive to the giving the Bond; but as to the other *Items* of the Bill, he ought to be allowed them notwithstanding the Bond. And so his Lordship was pleased to decree accordingly. Vide the next Case.

May 2.

Walmesley and Booth.

Ante 475.

THIS Cause was now reheard; and upon the Rehearing his Lordship's Opinion was, that the Decree, which he before made, ought to be reversed. He said, that there are several Grounds which have been offered to shew, that this Decree ought to be reversed, some arising from the general Nature of the Case, by considering this Bond as a Deed obtained by an Attorney of his Client, during the Time that he was employed by him; and the other Grounds for this Reversal have been offered as arising from the particular Circumstances attending this Transaction, and the obtaining this Bond, which have been more particularly

cularly and minutely considered, than they were on the former Hearing. These different Arguments will be proper to be distinctly considered of. And when that is done, the remaining Question will be, whether this Bond is to be set aside intirely, or whether it ought to stand as a Security for what is due from *Walmesley* to *Booth*, on the Account of the Business which was done by *Booth* for *Crook*? With regard to the first of these Arguments, his Lordship said it seemed to him to be of very great Weight, and was the principal Thing which influenced him to alter the Opinion which he was of before. Attornies and Solicitors are to be considered as publick Officers and Ministers of Justice. Upon this Ground it is, that in Courts both of Law and Equity they have stated Fees allowed them for their Service, and are under the Government of the severall Courts in Relation to their Behaviour to their Clients. The Courts exercise a much larger Authority over them, and interfere much more in Contracts which they make with their Clients, than they do in other Cases. For which Reason it is, that Courts both of Law and Equity, and especially the Courts of Law, have certain Rules in order to regulate the Behaviour of these Persons, both with regard to their Method of Proceeding, and to the Satisfaction which they are to receive from their Clients. Upon this Ground it is, that if an Attorney accepts a Retainer from his Client, and does not appear for him, the Court will compel him to do it, either at the Instance of the Plaintiff or of the Defendant. So likewise on the other Hand, when a Client has retained an Attorney, he shall not change him without Leave of the Court. These Things shew that there is a very strong Relation between Attornies and their Clients. Attornies and Solicitors, when they have accepted Retainers from their Clients, are bound to serve them for the stated Fees which are allowed by the severall Courts. And if an Attorney extorts more Money from his Client, than the Courts allow of, or makes a Contract with his Client to have more Money, the

Attornies
and Solici-
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the Courts will give Relief. Consider then the Nature of the present Case. *Booth* was imploy'd by *Crook* as his Attorney on the 21st of *October* 1728; and it is agreed on all Hands, that *Crook* had no Acquaintance with *Booth* till the Time when he so imployed him. There was very little Business which *Booth* did for *Crook* between that Time and the 2^d of *December*, when the Bond was given. And during that little Space of Time he has constantly charged Fees for the Business which he did, and that for every minute Attendance. *Booth* admits by his Answer, that at the Time the Bond was given there was but 26 *l.* which was owing him from *Crook*. It appears that *Crook* was at that Time under Prosecutions for great Offences. It is plain therefore, that he was a Man under Distress, though the Distress was brought upon him by the Crimes which he had committed. Under these Circumstances it is, that *Booth* is imployed to draw his Will. It is said, the Instructions were drawn with *Crook's* own Hand, and that in those Instructions the Legacy of 1000 *l.* was inserted. But *Booth* was not satisfied, that this should rest upon his Will, and therefore got him to execute a Bond to confirm it. This Bond is given in the Penalty of 2000 *l.* and the Condition is to the following Effect. "Whereas *John Booth* has been service-
 " able to *Japhet Crook* in several Causes, and still con-
 " tinues to be so, and the said *Japhet Crook* being through-
 " ly sensible of the Services and Favours, if the said *Ja-*
 " *phet Crook* shall leave to the said *John Booth* a Legacy
 " of 1000 *l.* then the Obligation shall be void, otherwise
 " to stand in full Force." It has been said, that the Meaning of this Bond is only to give this Legacy a Preference in Payment to the other Legacies, which were given by his Will, and that it remains a Legacy still, and is not a Debt. But the Purport of this Bond is more than barely to give this Legacy a Preference in Payment to the other Legacies; for though notwithstanding this Bond, the Payment of this Legacy would be postponed in Respect of Creditors; yet the Consequence of the Bond is, that the
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Will, with Regard to this Legacy is thereby made irrevocable, and the Bond remains a Debt upon the Estate, to be paid at least after Creditors. Consider then the Cases, which the present one has been compared to. One of these Cases has been that of young Heirs entering into Bonds, which this Court relieves against, without particular Evidence of their Weakness, or of actual Imposition, but on the general Principle, that it is not fit, in Respect of the Publick, that Bonds and Agreements of that Sort should stand. And undoubtedly the present Case does in some Measure partake of that, though not throughout. For there there is a presumed Distress, and a Presumption of a Liableness to be imposed on. That Distress puts them under a Temptation of entering into Contracts, which otherwise they would not. And that is the Ground, upon which, in Respect of the Publick, the Court relieves. Consider then the Nature of the present Case, and compare it with that. *Crook* was at that Time under a Prosecution for Forgery; he must be therefore considered to be under Circumstances of Distress, and consequently the Defendant, who was his Attorney, must have had a Power over him. Another Case, which the present one has been compared with, has been that of Mortgages, where the Court will not suffer hard Clauses to be inserted in them. And therefore tho' the Court will allow a Mortgage to be made in this Manner, that 5 *l. per Cent.* may be reserved, with a *Proviso*, that if the Interest be paid within a certain Time after it is due, that the Mortgagee will accept 4 *per Cent.* and that shall be good; yet if a Mortgage is made in this Manner, that 4 *per Cent.* is only reserved for Interest, with a *Proviso*, that if the Mortgagor does not pay such Interest within a certain Time after it is due, he shall pay an Interest of 5 *per Cent.* such *Proviso* will not be good; and that has several Times been determined. The Borrower is considered as a

What is the true Ground upon which the Court relieves, in setting aside a Deed made by a young Heir.

Though the Court will allow a Mortgage to be made in this Manner, that 5 *per Cent.* may be reserved, with a *Proviso*, that if the Interest be paid within a certain Time after it is due, that the Mortgagee will accept

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4 *per Cent.* and that shall be good; yet if a Mortgage is made in this Manner, that 4 *per Cent.* is only reserved for Interest, with a *Proviso*, that if the Mortgagor does not pay such Interest within a certain Time after it is due, he shall pay an Interest of 5 *per Cent.* such *Proviso* will not be good.

How far the Court relieves in setting aside Agreements made between Attornies and their Clients in respect of the Publick.

What shall not be considered as a voluntary Bond when given by a Client to his Attorney.

Where the Recital of a Bond shall be said to be false.

What shall not be said to be Part of the Consideration for the Giving of a Bond.

How far the Procuring Bail by an Attorney is not a proper Consideration for the Giving him a Bond.

Servant of the Lender, and to be under his Power, and therefore the Court will not suffer hard Terms to be put upon him. That is a Case something similar to the present one, and so is the Case of Marriage-Brokage Bonds. In these Sort of Cases 'tis on the Account of the Publick, that the Court relieves; and 'tis on that Account, that it ought to relieve in the present Case. The next Thing proper to be considered is, the particular Circumstances, which the present Case is attended with. The Defendant insists by his Answer, that this was a voluntary Bond enter'd into by *Crook*. But though this is called a voluntary one, yet it is plain, that when it was first of all entered into it was not intended, that it should be taken to be such; for it recites that *Booth* had been serviceable to *Crook*, and still continued to be so. What are these Services, that can be alledged in order to justify this Recital? Nothing but what has been before-mentioned; and that shews that this was a false Recital, and that is an Evidence of an Imposition. The procuring Bail cannot be said to be Part of the Consideration; for the Bond bore Date the 1st of *December*, though it was not executed till the 2d, and the Bail upon the *Certiorari* was not given till the 3d. Besides, in the Nature of the Thing, the procuring Bail by an Attorney is not a proper Consideration for such a Bond. The getting hir'd Bail and common Bail is one of the Things, that amount to an Act of Bankruptcy. It does not appear, that the Defendant gave any collateral Security to the Bail, as a Motive to them to become such; had he done that, indeed it might have been a Consideration for a Reward. But nothing of this is pretended. And what are the other Services, which he did after the Bond was given? Nothing but the common Services of an Attorney, for which he has charg'd his Fees for every *Item*. For these Reasons his Lordship said his Opinion was, that whether this Case is consider'd upon the general Nature of it, or upon the particular Circumstances that attend it, the Bond ought to be reliev'd against; and if it was not, it would be a Thing of very dangerous Consequence. The remain-

remaining Question to be considered is, whether the Bond ought to be set aside intirely, or whether it should stand as a Security to the Defendant for what is due to him. Now it is a good deal submitted to on the Part of the Plaintiff, that it should stand as a Security. It must be inquired into by the Master, what the Services were, which the Defendant did for *Crook*, and what he ought to be allowed for them. The Master must likewise inquire, whether the Defendant ought to have an Allowance made him for any extraordinary Services which he did. The Bond must stand as a Security for the Whole that is due. And so his Lordship was pleased to decree accordingly.

Where the Master shall inquire what one Man deserves for Services done for another.

Where the Master shall inquire what an Attorney deserves for his Client.

extraordinary Services done for

The Attorney General and Gardner.

May 4.

IN 1304 a Deed of Composition was made between the Impropriators of the Parish of *Bisley* and the Inhabitants of *Stroud*, to the following Effect. The Deed recited, "That whereas between the Chapel of *Stroud* and the Mother Church of *Bisley* there is so great and dangerous a Distance, that Men can't well pass between the one and the other, whereby great Danger of Souls may very likely happen in Baptizing of Infants, and Administring other Ecclesiastical Sacraments, and thereupon it was agreed, that in the Chapel of *Stroud*, at the Charges of the Inhabitants thereof, Baptism shall be used, and also that the Chaplain should be chosen by the Impropriators afore said." Then came a Clause in these Words.

The Construction of an ancient Deed of Composition.

Ita tamen quod Acra seu Tenementum in la Strode, quam vel quod Johannes de Pridie pro certo redditu hætenus tenuit de Rectoribus antedictis, ad mansum ejusdem sacerdotis deputetur per eosdem. Per ipsos tamen habitatores de Strode supradictos, cum in eorum commodum Acra hujusmodi assignetur, edificabitur competenter, & quotiescunque & quandocunque edificium hujusmodi reparatione vel emendatione indigebit qualitercunque, totum fiat sumptibus eorundem. Reddant etiam inde

&

Et ibidem annuatim iidem habitatores ipsis rectoribus octodecim denarios, sicut hactenus fieri consuevit. Ad stipendium vero præfati Capellani quindecim solidos. Afterwards came these Words, Qui si malitiose Et in dispendium ipsius Capellani satisfacere (quod absit) cessaverint in eisdem, volunt Et consentiunt partes antedictæ, quod præordinata penitus cesset Cantaria illa, tamen inibi habita ac obtenta, quæ prius fieri consuevit. Prædictum etiam Tenementum ad eosdem rectores libere absque contradictione qualibet revertatur.

In 1493 the Church-Wardens, and the major Part of the Parishioners of *Stroud* and *Bisley* caused this Instrument to be exhibited before the Chancellor and Commissary of the Bishop of *Worcester*, who decreed the same to be exemplified by a Notary Publick, and to be enter'd in the Registry of the Bishop, to perpetuate the same, and to give the better Credit thereto. In 1598 the Church-Wardens and Parishioners in order to add greater Credit to this Instrument, caused the same to be shewn before the Person who was at that Time Chancellor and Commissary of the Bishop of *Worcester*. He subscribed the same, and caused the Episcopal Seal to be added to it, and decreed, that Credit should be given for ever after to it.

In 1626 *Watts* made his Will, and thereby directed, that the Sum of 200 *l.* should be laid out in the Purchase of Land, and that one Moiety of the Profits thereof should be paid towards the Maintenance of the Lecturer in the Parish of *Stroud*, if he should continue therein; and that the other Moiety should be employed for the better Support of the Poor of that Parish. Accordingly that Money was laid out in the Purchase of Lands in *Colthrop*. At the Time this Will was made there was a Sermon in the Nature of a Lecture, usually preached once a Week in this Chapel, not by the Chaplain, but by other Persons. And afterwards sometimes the Chaplain used to preach it, and at other Times it used to be preached by the neighbouring Clergy. When the neighbouring Clergy used to preach it, they

they first of all used to have a Dinner provided for them; but afterwards had 5 s. allowed them, by the voluntary Contribution of the Inhabitants; and the Chaplain all along received the Moiety of the Profits of this *Colthrop* Estate.

In 1637 the surviving Feoffees of the Land called *Pridie Acre*, mentioned in the Deed of Composition, executed a Deed, whereby they declared the Uses of all the Estates, which they were in Possession of, to be in Trust to imploy the Rents and Profits thereof towards Repairs of the Church of *Stroud*, and Support of the Poor within that Parish. This Acre of Land had Houses built upon it at the Time this Deed was made; but when those Houses were built did not appear. From the Time this Deed was made, nor even from the Time that the Deed of Composition was made, it did not appear that ever the Chaplain was in Possession of this *Pridie Acre*, or of the Houses that were built upon it; however, before the making of this Deed of 1637 it appeared that he often received the 15 s. *per Ann.* mention'd in the Deed of Composition; and after the Deed of 1637 the Chaplains at various Times received 15 l. *per Ann.* of the Church-Wardens, but sometimes the Sums were not so much.

In 1722 *Henry Bond* was appointed Chaplain; soon after he was appointed, Contests arose concerning what he should be allowed. Upon that Occasion the Inhabitants applied to Mr. *Cox*, who was a Lawyer, to take his Opinion, and he advised them, that they should allow him 15 l. *per Annum*; accordingly in 1726 they made an Order, that they would allow him this 15 l. *per Ann.* That Order was signed by the principal Inhabitants; and particularly by *Gardner* and *Capel*. After this Order was made *Bond* received this 15 l. *per Ann.* but they never let him live in a House which was called the Minister's House, wherein the Chaplain for the Time being had lived for a great many Years before.

In 1736 the Rural Dean sent a Paper Writing to the Church-Wardens of *Stroud*, and thereby informed them, that he found that there was a Benefaction given to the Church and Minister of *Stroud*, which was not wholly imployed to that Use; and that the House, which was allow'd to former Ministers, was not allowed to the present one; and thereupon they were required to give an Account how this Charity was disposed of, with a Certificate thereof under their Hands, to the Bishop at his Palace at *Gloucester*. *Gardner* and *Capel* were the two Church-Wardens at that Time; they refused to do any Thing in pursuance of this Presentation of the Rural Dean; and thereupon the present Information was brought at the Relation of *Bond* against *Gardner*, *Capel* and others, praying that the Defendants might account for the Profits of the Land called *Pridie Acre*, and for the Rents of the Messuages and Premisses, which were built upon it, ever since *Bond* was Chaplain of this Parish, or at least that they might pay him 15 *l. per Ann.* thereout, which *Bond* declared by the Information, that he was willing, and did thereby offer to accept. The Information farther pray'd, that the Defendants might account for a Moiety of the Rents of the Lands of *Colthrop*, and that they might let the Relater into the Possession of the Minister's House; and that they might account for the Rents of that House since the Time that the Relater was Chaplain.

Lord Chancellor said his Opinion was, That the Relater was intitled to the Land which belong'd to *John* of *Pridie*, and to the Houses which were built upon it; that he was likewise intitled to the Minister's House; but that he was not intitled to the Profits of a Moiety of the Estate in *Colthrop*, and that the Lecturer was only intitled to them. He said, the first Question in the present Case is, Whether the Relater is not intitled to the Land which belong'd to *John* of *Pridie*, and to the Houses which are built upon it. Now as to that it is certain, that there are other Lands,
 4 which

which the Church-Wardens are in Possession of besides these, and which the Relater can't be intitled to. Those Lands came to them by Conveyances long subsequent to the Deed of Composition. In 1637 they thought proper to comprise all the Lands and Houses, which they were in Possession of, in one general Feoffment, and the Trust of that was declared to be for the Repairs of the Church of *Stroud*, and the Poor of that Parish. This Deed of Feoffment comprehended within the general Words of it, the Lands which belonged to *John of Pridie*, and the Houses which were built upon it, as well as the Rest of the Lands which they were in Possession of; but whether they had a Power to declare the Trust as they have done, with regard to the Land which formerly belonged to *John of Pridie*, and to the Houses which have been built upon it, depends upon the Deed of 1304. That is an ancient Deed of Composition, and was made upon a very reasonable Oc-
The Construction of an ancient Deed of Composition.
casion. The Parish of *Stroud*, which the Chapel belonged to, was at some Distance from the Mother-Church of *Bisley*; by being thus at a Distance great Inconveniencies arose to the Inhabitants of *Stroud*, and likewise to the Persons who officiated in the Mother-Church of *Bisley*. Upon this it was agreed, that the Rector of *Bisley* should give the Inhabitants of *Stroud* an Acre of Land towards the Maintenance of a Chaplain, and that the Inhabitants should build upon it. The Chaplain was to be appointed by the Rector. Then follow the Words. *Ita tamen quod Acra seu Tenementum in la Strode, quam vel quod Johannes de Pridie pro certo redditu hætenus tenuit de rectoribus antedictis, ad mansum ejusdem sacerdotis deputetur per eosdem. Per ipsos tamen habitatores de Strode supradictos, cum in eorum commodum Acra hujusmodi assignetur, edificabitur competenter, & quotiescunque & quandocunque ædificium hujusmodi reparatione vel emendatione indigebit qualitercunque, totum fiat sumptibus eorundem. Reddant etiam inde & ibidem annuatim iidem habitatores ipsis rectoribus octodecim denarios, sicut hætenus fieri consuevit. Ad stipendium vero præfati Capellani quindecim solidos.* Afterwards came these Words, *Qui si malitiose & in dispen-*
dium

dium ipsius Capellani satisfacere (quod abfit) cessaverint in eisdem, volunt & consentiunt partes antedictæ, quod præordinata penitus cesset Cantaria illa, tamen inibi habita ac obtenta, quæ prius fieri consuevit. Prædictum etiam Tenementum ad eosdem rectores libere absque contradictione qualibet revertatur. The plain Meaning of these Clauses is, that the Ground, which formerly belong'd to *Pridie*, was to be for the Manse of the Chaplain, and that the Inhabitants of *Stroud* were to build a House upon it for the Living of the Chaplain upon the Manse. The Rectors were to have their ancient Rent paid them of 18*d.* per *Ann.* but there was to be 15*s.* paid *ad stipendium* of the Chaplain. What does this amount to? The Rectors part with their Piece of Ground for the Manse of the Chaplain. The Inhabitants agree to build a House upon it, and to indemnify the Rectors in respect of the 18*d.* per *Ann.* which they used to pay. The Instrument then provides for a Stipend for the Chaplain of 15*s.* per *Ann.* But that must not be understood to be paid out of the Land, but by way of Collection amongst the Inhabitants. This is one of the clearest penn'd Instruments that is almost to be seen, considering the Antiquity of it. The House was to be built by the Inhabitants, it was to be repaired by them, they were to pay this Stipend, and if they did not the Chantry was to cease, and the Tenement was to revert to the Rectors. These were the Terms of the Composition. The Question is, what the Chaplain is intitled to. And his Lordship said his Opinion was, that the Chaplain was clearly intitled to all the Profits of the Land which formerly belonged to *Pridie*, and of the Houses which had been built upon it. The Doubt arises upon the Construction of the Words *ad mansum*. The whole Acre seu *Tenementum* is appointed for the *Mansus* of the Chaplain. Now *Mansus* is sometimes taken in as large a Sense as *Fundus*. Sometimes it is taken in a middle Sense, to signify the same as *Messuagium*, so as to signify the House and Curtilage, as the Gardens and Orchard belonging to it. This seems to be the Meaning of the Word in the present Case. The Instrument seems to intend, not that the Acre of Land should

Out of what
a Stipend
shall be con-
strued to
arise.

The Con-
struction of
the Word
Manse.

should be built all over with Houses, but that it should be built with proper Conveniencies for the Chaplain. 'Tis indeed true, if the Inhabitants built more upon the Acre of Land than they were obliged to, they would be intitled to reimburse themselves; and this may account for their only paying 15 *l. per Ann.* to the Chaplain for so many Years as they did. The Rest of the Profits they might have retain'd to themselves in order to reimburse themselves the Monies, which they had expended more than they ought to have done; but when they are reimbursed, there is no Question but that the Chaplain is intitled to the Profits of all the Houses which they built upon the Land. It has been objected, that there has been no uniform Payment made to the Chaplain; that till the Year 1653 he does not appear to have received more than 15 *s. per Ann.* which it is alledged may have been for the Stipend, and that even after the Year 1653 there was no uniform Payment of 15 *l. per Ann.* any longer than 1658. And 'tis indeed true, that the Fact is as has been mention'd; and after the Year 1658 sometimes there was only 10 *l. per Ann.* paid the Chaplain, sometimes only 7 *l. per Ann.* and the Sums frequently varied. But that which has been before suggested, that the Church-Wardens might retain to reimburse themselves, answers that Objection. And another Answer, which may be given to it, is, that the Rents of the Houses might greatly vary. In 1726 the Parishioners made an Order, that the Chaplain should constantly be paid 15 *l. per Ann.* for the future. That Order was a very reasonable one; and it would have been best for the Chaplain and Parishioners, if they had continued to have acted under it to the present Time. From the Time that Order was made the 15 *l. per Ann.* did continue to be paid till 1736, when the Presentation was made by the Rural Dean, and then it was discontinued again. The next Question proper to be consider'd relates to the Moiety of the Estate which lies in *Colthrop*. And as to that the Lecturer must be intitled to it, and not the Chaplain. This Charity was given by the Will of *Watts* in 1636, and it was doubtful at that

When Persons build upon another's Land, where they shall be intitled to enjoy the Benefit of the Houses till they have reimburs'd themselves.

When one Man builds Houses on Land of another, and retains the Benefit of those Houses till he has reimburs'd himself, how far those Houses shall afterwards belong to the Owner of the Land.

What Words extend only to a Lecturer.

At what
Time Lec-
turers first
began to be
established.

When the
Court fees
that a Person
is intitled to
a Charity,
where they
will decree
in Favour of
it, tho' no
Information
is brought by
the Party
who is inti-
tled to it.

If a Charity
appears on an
Information
for it, the
Information
shall not be
dismissed not-
withstanding
it prays, that
the Charity
may be ap-
plied in an
improper
Manner.

Time, whether the Lecture would continue, or not. Lecturers first began to be established in the Reign of *Q. Elizabeth*; and Archbishop *Laud* was for suppressing them, by Reason that they did not come in by Presentation, but by the Choice of the Parishioners. And it is probable, that that was the Reason for inserting that Restriction to the Clause of the Will, which gave the Moiety for the Benefit of the Lecturer, namely, if he shall continue to be so. It is indeed true, that this Moiety has been regularly paid to the Chaplain, and not to the Lecturer. But during Part of the Time the Chaplain preached the Lecture; the Lecturer must be the Person that is intitled to this Money. And as the Court fees, that this is a Charity, which the Lecturer is intitled to, the Court must Decree a proper Application to be made of it, tho' no Information is brought by the Lecturer for that Purpose. His Lordship observ'd, that he has heard it said in this Court, that if a Charity appears in an Information for it, the Information shall not be dismissed, notwithstanding it prays, that the Charity may be applied in an improper Manner; and this Rule seems to be taken by this Court from a like Rule, which is observed by Commissioners of Charitable Uses. The only Question remaining to be considered, relates to the Minister's House. And as to that, the Chaplain must be intitled to have his Living in it. The Chaplains having constantly lived in this House for so great a Length of Time is a strong Evidence, that they have a Right to do so.

However his Lordship recommended it to the Parties to see if they could not agree the Matter between themselves. And afterwards they agreed the same accordingly.

May 8.

Schuldam and Barcham.

ON the Marriage of *John Barcham* with *Mary Spore*, *Bartholomew* the Father of *John* made a Settlement of certain Freehold and Copyhold Lands, particularly de-
scribing

scribing them in the Parish of ——— and of all other his Freehold and Copyhold Lands lying in that Parish. These Lands were settled for the Benefit of *Bartholomew* for his Life, the Remainder to *John* and *Mary*, and the Heirs of their Bodies, the Remainder to ——— in Fee. In this Settlement *Bartholomew* covenanted to make a Surrender of the Copyhold for the Benefit of *Mary* for her Life; no Surrender was ever made of any Part of the Copyhold Land; *John* and *Mary* died, leaving Issue one Daughter, named *Mary*, who intermarried with *Abraham Schuldam*.

The present Bill was brought by *Mary Schuldam* against the Heir at Law of *Bartholomew*, praying amongst other Things, that the Defect of the Surrender might be supplied.

Lord Chancellor said, his Opinion was, That it ought to be supplied with regard to those Copyhold Lands, which were particularly described, but that it ought not with regard to those Copyhold Lands, which were described generally. For as to those which were described generally, the Covenant which was inserted in the Deed is an Evidence, that those Lands were only to be surrendered for the Benefit of *Mary Barcham* for her Life. An express Clause of that Sort may explain such general Words preceding, tho' it cannot explain the particular ones. And so his Lordship was pleased to decree accordingly.

How far a precedent Clause, that is general, may be explained by a subsequent Clause, that is particular.

Gibson and Smith.

May 9.

IN 1721 *Philip* Duke of *Wharton* executed a Deed, whereby he conveyed certain Lands to Mr. Justice *Denton*, Mr. *Gibson*, and others, in Trust, to be sold for Payment of his Debts. After this a Bill was brought by *Benjamin-Hoskins-Stiles* and others against *Gibson* and others, in order that these Estates might be sold for the Payment of those Debts. In 1723 that Cause came on to be heard, and

and a Decree was made for that Purpose accordingly. In 1727 a Particular was left with the Master of the Manors of *Healaugh* and *Mewker* in *Yorkshire*, which were proposed to be sold under this Decree. In this particular these Manors were mentioned, and likewise certain customary Rents amounting to the Sum of ——— But there was no Mention of the Tolls and the Free Rents amounting to 9*l.* 16*s.* 8*d.* *per Ann.* There was an Exception inserted in this Particular in these Words, “ Saving and reserving always
 “ to the Trustees, their Heirs and Assigns, all and singular
 “ the Mines, Veins and Parcels of Lead, Copper, and Pot-
 “ ters Ore, which now are, or at any Time hereafter may
 “ be discovered, or found lying, being, arising or growing in
 “ or upon all and every the Commons and Wastes of the a-
 “ foresaid Manors, with full and free Liberty, Power, Pri-
 “ vilege and Authority, with Miners, Agents, Workmen and
 “ Labourers, to search for, dig, work, sink, make Shafts,
 “ and use all other Ways and Means from Time to Time,
 “ for Finding, Discovering and Working of any such Mines
 “ of Lead, Copper and Potters Ore, and to make Drifts, Ad-
 “ dits, Levels, and all other Things necessary for the Find-
 “ ing, Raising, Obtaining and Getting the same; and also to
 “ dress and cleanse the said Ore from Rubbish and Stone,
 “ and to erect any Engine or Engines upon the Premises,
 “ and to turn and direct any Water or Waters for the ma-
 “ king of Water-courses or Dams, as shall be useful for the
 “ Working such Engines, or for any other Use or Advantage
 “ of the said Works and Mines, and for cleaning the said Ore,
 “ and also free Liberty of Ingress and Regress, into and out of
 “ the said Mines, and to make, have, and use all convenient
 “ Ways and Passages within all and every or any Part of the
 “ Premises mentioned, or intended to be hereby sold and
 “ convey’d, to and from the said Mines and Works, with
 “ Men, Oxen, Horses and Carts, and by and with all other
 “ Ways and Means, Instruments and Carriages, as well for
 “ bringing of Timber, Iron, Corn, Coal, Minerals, and all
 “ other Necessaries to and for the Use of the Miners, La-
 “ bourers, and Workmen there, and to build and erect upon
 “ any

“ any Part of the said Wastes, convenient Houses or
“ Cottages, for the Habitation of the Agents, Work-
“ men or Miners, whilst they shall be imployed in and
“ about the Working such Mines, and raising and clean-
“ ing the said Ore and Minerals, and also to build and
“ erect on the said Waste, or any Part thereof, conve-
“ nient Bingsteads, Smiths-Forges, Mills, Furnaces, En-
“ gines and Store-houses, Hovels, Buildings for Dressing,
“ Bucking, Cleaning, Running down and Smelting, Refi-
“ ning, and for putting up, preserving and keeping the
“ said Ore; and also Liberty to cut, dig and raise, and
“ take in and upon the said Wastes, and waste Ground,
“ or any Part thereof, so much Stone and Clods as shall
“ be necessary and needful, for making and repairing
“ such Cottages, Buildings and Works. The Trustees
“ except also and reserve to themselves, their Heirs and
“ Assigns out of the Manors of *Healaugh Old Land*, *Hea-*
“ *laugh New Land* and *Muker*, full and free Liberty, Power
“ and Authority to dig for, cut, raise, dry, take and
“ carry away all such Peat, Turf and Turbary, from
“ Time to Time, in and upon, and from the said Moors,
“ Mosses, Wastes and Commons, as the said Trustees,
“ their Servants, Smelters or Workmen shall have Occa-
“ sion for and use, as well in the Smelting, Running
“ and Making the said Ore, Minerals and Metals into
“ Lead, as for the Ease, Benefit and Convenience of
“ the Miners, Workmen, Washers, Leviers, and others
“ imployed in and about the said Mines, and also excepting
“ all and every Lease or Leases granted and demised, of
“ any Mines or Liberties for Searching for, discovering
“ and working the same in any Part of the Premises; and
“ all the joint Profits and Advantage thereby arising and ac-
“ cruing.” At the Bottom of this Particular, were Words to
this Effect. “ This is a true Particular so far as the Tru-
“ stees are able to discover, but the Bidders must satisfy
“ themselves as well of the Truth of the Particular, as of
“ the Charges and Outgoings that there are upon the E-
“ state; for the Trustees will not be answerable for these

“ Matters.” *Smith* became a Purchaser of these Estates at 10500 *l.* A few Months after he was reported to be the best Bidder, he applied to *Gibson*, in order that a Conveyance might be made him of this Estate. *Gibson* was desirous that a Draught of it should be sent into *Yorkshire* to *Close*, who was acquainted with this Estate, before that the Conveyance should be executed; but *Smith* was pressing to have a Conveyance forthwith made of it; and promised that if there were any Mistakes in the Conveyance, the same should be rectified. In this Conveyance, the Words *All Tolls and Rents* were inserted; but there were two Exceptions in it, in these Words, “ Saving and reserving
 “ to them, their Heirs and Assigns, all and singular the
 “ Mines, Veins and Parcels of Lead, Copper and Potters
 “ Ore and Iron, which then were, or at any Time here-
 “ after might be discovered, or found lying, being, arising
 “ or growing, in or upon all and every the Commons and
 “ Wastes of the aforesaid Manor, with full and free Li-
 “ berty, Power, Privilege and Authority, with Miners,
 “ Agents, Workmen and Labourers, to search for, dig,
 “ work, sink, make Shafts, and use all other Ways and
 “ Means from Time to Time, for finding, discovering and
 “ working of any such Mines of Lead, Copper and Pot-
 “ ters-Ore and Iron, with the several other Liberties and
 “ Privileges relating thereto therein mentioned. And also
 “ save and except all and every Lease or Leases, granted,
 “ demised or agreed for, of any Mines or Liberties of
 “ Searching for, discovering and working the same in any
 “ Part of the Premises, or ordered by the High Court of
 “ Chancery to be made to the Governors and Company
 “ of the Mine-Adventurers of *England*, and all the Inte-
 “ rest, Profits and Advantage thereby arising and accru-
 “ ing.” At the Time that *Smith* made his Purchase, *Gibson* had entered into a Contract with *Abraham Fryer*, whereby he had agreed, that *Fryer* should have Liberty of working a Mine in *Smarbar-Hall-Farm*, which was Parcel of the Premises; but *Smith* insisted, that this Bargain with *Fryer* was not within the Meaning of the second Exception,
 and

and therefore that he had a Right to disturb him. He insisted likewise, that he had a Right to the Mines that were in certain Lands called the common Pastures, notwithstanding the first Exception. As to the Nature of these common Pastures, the Fact was in the Manner following. These were inclosed Lands, which lay contiguous to the inclosed Parts of the Waste from the Middle of *April* to the Middle of *September*; the Gates belonging to these common Pastures were always used to be shut, and at those Times these Lands were fed by the customary Tenants belonging to these Manors exclusive of the Lord. During the rest of the Year the Gates were thrown open. It was sworn by the Witnesses on the Part of *Smith*, that even in that Part of the Year, when the Gates were thrown open, only the customary Tenants had a Right to the Feed of these Lands; but it was sworn on the Part of *Gibson*, that in that Part of the Year, all the Tenants of the Manor had a Right to have their Cattle go there. Thus the Matter stood as to these Lands, with regard to the Account which the Witnesses gave of them; however it was insisted on the Part of *Smith*, that an Award which had been made, and was confirmed by a Decree of the Court, had put it out of all Question, that these Lands ought to be considered the separate Property of the customary Tenants, and not as any Part of the Waste of the Lord. With regard to this Piece of Evidence, the Fact was in the Manner following. In the Reign of King *James I.* a Bill was brought by an Ancestor of the late Duke of *Wharton*, against certain Tenants of these Manors, in order to have reduced their Estates to the Nature of Copyhold. On the other Hand the Defendants insisted, that they were Tenant-right Estates. When this Cause came on to be heard, it is taken Notice of in the Drawing up of the Decree, that the Court did much Dislike that Kind of Estate which the Defendants insisted on; and thereupon a Reference was made to Mr. Baron *Altham* and Mr. Baron *Bromley*, to determine the Matters that were in Difference between the Plain-

Plaintiffs and the Defendants; the two Barons first of all made one Kind of Certificate, but afterwards they made another, and prayed that the first might be taken off the File. The Purport of the second Certificate was in this Manner. " They awarded that the Plaintiff and his As-
 " signs should make Conveyances to the Defendants of
 " their Estates by Copy of Court-Roll, and that the De-
 " fendants should pay to the Plaintiffs twenty Times the
 " antient Rent for such their Admission; and that they
 " should pay twelve Times the antient Rent for

" As to the Widow's Estate in these Lands,
 " they directed that it should be discharged of the *Running*
 " *Gressum*. And then came the Clause which was so
 much relied upon on the Part of *Smith*, and was to this
 Effect. " All the Heaths, Moors, Pastures and Grounds
 " which are now held as common Pastures, shall from
 " henceforth be considered as stinted Pastures, and as Par-
 " cel of the several Tenements belonging to the customary
 " Tenants, and be paid for according to the Rate of twen-
 " ty Times the antient Rent on their Admission, as if the
 " same Pastures had now been held by the Tenants in Se-
 " veralty." The Arbitrators directed, that an Applica-
 tion should be made to Parliament, in order to have this
 Award confirmed; but no such Application ever appeared
 to be made. However, the Cause came on again; and
 then the Court decreed, that the Award should be esta-
 blished according to this second Certificate. In 1680
Philip Marquis of Wharton brought a new Bill against cer-
 tain of the Tenants much to the same Effect with the
 former. But on the Hearing of that Cause the Court at
 first directed, that it should be dismissed with Costs; how-
 ever afterwards those Costs were excused. Thus the Mat-
 ter stood with regard to these common Pastures, and *Smith*
 insisted, that they were no Part of the Waste or Commons
 of the Manor, wherein the Soil was in the Lord, and con-
 sequently, that he was not excluded by the first Exception
 from digging Mines in these common Pastures. He insist-
 ed likewise, that he had a Right to the Tolls and free

Rents

Rents before-mentioned. However he made no actual Beginning to dig any Mines in these common Pastures, nor did he disturb *Fryer* in the Enjoyment of the Bargain, which he had made with *Gibson* for working the Mine in Part of the *Smarbar-Hall Farm*, nor did he receive any of the Tolls or Free Rents before-mentioned.

The present Bill was brought by *Gibson* against *Smith* and *Jacomb*, praying, amongst other Things, to have an Injunction to restrain *Smith* from working any Mines in these common Pastures, and likewise to prevent him from disturbing *Fryer* in the Bargain before-mentioned, to restrain him from receiving the Tolls and Free Rents, and as to them to have a Reconveyance.

Lord Chancellor said, That there were three Questions proper for his Consideration, which related to the Matter of Right between *Gibson* and *Smith*; but it would be proper in the first Place to take Notice of a previous Objection which has been made against the Regularity of the Plaintiff's Bill. It has been urged, that if the Plaintiff is right in what he contends for, namely, if the Mines in the common Pastures are excepted in the Particular, and by the Conveyance the Plaintiff has a legal Right to them; and if the Bargain which was made with *Fryer* is included in the second Exception, *Smith* will be answerable in an Action at Law, if he disturbs him. For which Reason it has been contended, that the Remedy at Law was open, and that the Plaintiff had no Occasion to come into this Court for Relief. And it is indeed true, that if the Plaintiff is right, *Smith* is answerable in an Action at Law in the Manner which has been mentioned. But notwithstanding that, in Case a Person either breaks up Mines, which he ought not to do, or even attempts or threatens to break them up, that is a Reason for coming into this Court to have an Injunction. This Remedy of having an Injunction lies in all Sort of Causes relating to Waste, and more especially so where Mines are dug up, or threatened to be dug up, contrary

How far the Threatning to dig up Mines is a Ground for an Injunction.

trary to the Right of the Party. Thus the Matter stands with regard to the Propriety of bringing a Bill in this Court, in order to restrain *Smith* from digging Mines in the common Pastures, and to prevent him from disturbing *Fryer* in the Enjoyment of the Bargain, which he had made with *Gibson* about digging a Mine in this *Smarbar-Hall-Farm*. And as to the Tolls and Free Rents, if the Plaintiff is right in what he contends for, that they were not intended to be included in the Conveyance, he must be clearly right in coming into this Court; for 'tis admitted, that there are sufficient Words to include them in the Conveyance, but the Plaintiff insists, that they ought not to have been included in it, and therefore brings his Bill to have a Reconveyance. To consider then the Matter with regard to the mere Right between the Parties; and as to that, the first Question is relating to the common Pastures. As to them it is insisted on the Part of the Plaintiff, that these common Pastures are Parcel of the Commons or Waste of the Lord, and as such are included in the first Exception, both in the Particular and in the Conveyance. On the other Hand it is insisted upon, on the Part of the Defendant, that these Pastures are the several Soil of the Customary Tenants.

What Lands
shall be con-
sider'd Part
of the Lord's
Waste.

But his Lordship said his Opinion was, that these Pastures were Part of the Common or Waste of the Lord. He said it seems extremely clear, that at least originally they were so. This is plain from their lying mixed with the other Land, which it is agreed on all Hands are Part of the Common or Waste of the Lord. 'Tis indeed true, that these Lands are richer than the others, and that may account for their being inclosed. 'Tis true likewise, that the Gates belonging to these Inclosures are shut from the Middle of *April* to the Middle of *September*, and during all that Time no Persons have a Right to feed them but the Customary Tenants. In *September* the Gates are thrown open; and as the Witnesses for the Plaintiff swear, from that Time to the Time of *April* all the Inhabitants of the Manor, who have a Right of Common in the general Waste of the Lord, have a Right to feed their Cattle in these Pastures.

stures. On the other Hand, the Witnesses for the Defendants swear, that even when the Gates are thrown open the Customary Tenants only have a Right to feed this Land. But these Witnesses only swear in general to the Right, which they say merely belongs to the Customary Tenants, and do not swear to Facts to shew, that this Land is at those Times only fed by the Cattle of the Customary Tenants, and not by the Cattle of the other Inhabitants. And in the Nature of the Thing it is not possible, that the Fact should be according to the Right, which the Defendant sets up; for 'tis agreed on all Hands, that the general Waste of the Lord, wherein all the Inhabitants have a Right of Common, lies contiguous to these Pastures. And as that is so, when the Gates are throw'd open the Pastures must be fed by the Cattle of the Inhabitants at large, as well as by the Cattle of the Customary Tenants. Thus the Matter stands with regard to the Evidence of the Witnesses of the one Side and of the other. But suppose the Fact was true, that the Customary Tenants only had a Right to feed this Land when the Gates are open, as well as when the Gates are shut; yet still it would by no means follow but these Pastures are to be consider'd as Part of the Waste; for there may be a Right of Common in some Parcels of Land for particular Tenants only, and yet that Land may be Part of the Waste, as well as if all the Inhabitants had a Right of Common in it. Provided the Soil belongs to the Lord, the Land is equally the Lord's Waste in the one Case as in the other. This makes it necessary now to consider the Effect of the Decree which seems to be the strongest Piece of Evidence on the Part of the Defendants. In the Reign of King *James* the First a Bill was brought by an Ancestor of the late Duke of *Wharton*, against certain Tenants of these Manors, in order to have reduced their Estates to the Nature of Copyhold. On the other Hand, the Defendants insisted that they were Tenant-right Estates. When this Cause came on to be heard, it was taken Notice of in the Drawing up of the Decree, that the Court did much dislike that Kind of Estate which the Defendants insisted

How far the Validity of Tenant-right Estates has been formerly called in question.

on, though of late Years it has been fully established ; and thereupon a Reference was made to Mr. Baron *Altham* and to Mr. Baron *Bromley*, to determine the Matters which were in Difference between the Plaintiff and the Defendants. The two Barons first of all made one Kind of Certificate, but afterwards they made another, and pray'd that the first might be taken off the File. The Purport of the second Certificate was in this Manner.. They awarded, " That the Plaintiff and his Assigns should make
" Conveyances to the Defendants of their Estates by Copy
" of Court-Roll, and that the Defendants should pay to
" the Plaintiff twenty Times the ancient Rent for such
" their Admission; and that they should pay twelve
" Times the ancient Rent for
" As for the Widow's Estate in these Lands they directed,
" that it should be discharged of the *Running Gressum*." And then came the Clause which was so much relied upon on the Part of *Smith*, and was to this Effect. " All the
" Heaths, Moors, Pastures and Grounds which are now
" held as common Pastures, shall from henceforth be considered as stinted Pastures, and as Parcel of the several
" Tenements belonging to the Customary Tenants, and be
" pay'd for according to the Rate of twenty Times the ancient Rent on their Admission, as if the same Pastures
" had now been held by the Tenants in Severalty." The Arbitrators directed, that an Application should be made to Parliament, in order to have this Award confirmed. But no such Application ever appeared to be made. However the Cause came on again, and then the Court decreed, that the Award should be established according to the second Certificate. In 1680 *Philip* Marquis of *Wharton* brought a new Bill against certain of the Tenants much to the same Effect with the former. But on the Hearing of that Cause the Court at first directed, that it should stand dismissed with Costs. However afterwards those Costs were excused. This last Decree has carried the Matter no farther in Favour of the Defendants than the former one did ; and that former Decree intirely depends upon the Force of the
the

the Award ; but that Award cannot be binding, as no Act of Parliament was obtained in order to confirm it, which the Award directed should be applied for. However, upon this Part of the Case his Lordship said, he should have been inclinable to have directed an Issue in order that it might be try'd, whether these Pastures were Part of the Waste or not ; but he did not see that the Decree could be of any Consequence if an Issue of this Sort was directed. If these Lands were originally Part of the Waste at Law, they must continue to be so notwithstanding the Decree ; for the Decree can only make them cease to be Part of the Waste in the Consideration of a Court of Equity. The Counsel for the Defendants thereupon shew'd their Desire, that an Issue of this Sort might be directed ; and at last his Lordship thought that he could not refuse to direct such Issue, the Defendants consenting to try it on Peril of Costs ; accordingly an Issue of that Sort was directed. His Lordship said, that he would now consider the two remaining Questions ; one of which relates to the Bargain which the Plaintiff made with *Fryer* ; the other of which relates to the Tolls and the Free Rents. As to the Bargain which the Plaintiff made with *Fryer*, his Lordship's Opinion was, that it was extremely clear, that it was within the Benefit of the second Exception, and consequently that the Plaintiff was intitled to the Benefit of it. The Words of the second Exception in the Conveyance are, " And also " save and except all and every Lease or Leases granted, " demised, or agreed for, of any Mines, or Liberties of " Searching for, Discovering and Working the same in any " Part of the Premises, or ordered by the High Court of " Chancery to be made to *The Governors and Company of " Mine Adventurers of England*, and all the Interest, Pro- " fits and Advantage thereby arising and accruing." The former Part of this Exception is general, and plainly takes in the Bargain in Question. It has been said, that the Bargain is not a Lease, and that that Word will not extend to it. But it certainly is a Liberty of Working a Mine, and those Words are made use of as well as Leases.

How far an Award, confirmed by a Decree, shall not be binding.

Where an Issue shall be directed, to try whether Lands are Part of the Waste or not.

What Things shall be taken to be included in an Exception.

Construction of Clauses whereby Mines are excepted.

Within what Words a Bargain relating to a Mine shall be included.

to the Tolls and Free Rents, they do clearly, on the other Hand, belong to the Defendant *Smith*. The Words of the Conveyance evidently take them in. It is said, that they are not included in the Particular, for that in the Particular the Customary Rents are only mentioned. But the Word *Manors* is made use of, and in that Word the Tolls and Free Rents are included. And this is the stronger in the present Case, by reason that these Words are added at the Bottom of the Particular. "This is a true Particular, so far as the Trustees are able to discover; but the Bidders must satisfy themselves as well of the Truth of the Particular, as of the Charges and Out-goings that there are upon the Estate, for the Trustees will not be answerable for these Matters." It has been said, supposing any Thing was included in the Words of the Particular, which were not strictly verified by the Fact, the Defendant would have been intitled to have had an Abatement. But his Lordship's Opinion was, that he would not. Possibly, if the Defendant had come before a Conveyance was made, he would have been intitled to have had such an Abatement; but considering that this Clause is added at the Foot of the Particular after a Conveyance was made, 'tis impossible that the Defendant could bring his Bill against the Trustees, to make them refund Part of the Purchase Money, or to have a Satisfaction against them. For the same Reason on the other Hand, as this Clause is inserted at the Foot of the Particular, the Trustees cannot come against *Smith* to make him either Refund or Reconvey. And so his Lordship was pleased to decree accordingly.

What Things shall be included in the Particular of an Estate.

When Trustees sell an Estate, and declare at the Bottom of the Particular, that the Purchaser must see to the Truth of the Facts of it, and that they will not warrant them, what shall be the Effect of such a Clause.

A
T A B L E
O F

The Principal Matters

Contained in

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'Tis indeed true, that the Giving a Person away is not a Thing essential to a Marriage, but 'tis a Custom usually observed. *ibid.*

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